93-335

No. _____

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In The

Supreme Court of the United States

October Term, 1993

JAMES G. LEDBETTER, COMMISSIONER
GEORGIA DEPARTMENT OF HUMAN RESOURCES,

Petitioner,

v.

DONNA SHALALA, SECRETARY
U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the U.S. Department of Health and Human Services may disallow federal funding to a state alleged to be out of compliance with the Older Americans Act, 42 U.S.C. § 3000 *et seq.*, when the governing statute makes no textual reference to a disallowance remedy and instead expressly provides for prospective withholding of funds under 42 U.S.C. § 3027 upon determination of non-compliance.

2. Whether the U.S. Department of Health and Human Services may disallow federal funding to the Petitioner under the Older Americans Act, 42 U.S.C. § 3000 *et seq.*, for more than one fiscal year when the governing statute only provides for adjustment of program funds in the current fiscal year and does not expressly authorize retroactive adjustments in funding.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

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Donna Shalala, defendant
Louis W. Sullivan, former defendant
U.S. Department of Health and Human Services, an agency
Honorable Horace T. Ward, trial judge
Joe D. Whitley, U.S. attorney

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JAMES G. LEDBETTER, COMMISSIONER
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To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner James G. Ledbetter, Commissioner of the Georgia Department of Human Resources, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on March 17, 1993.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported as *Ledbetter v. Shalala*, 986 F.2d 428

(11th Cir. 1993), and is reprinted in the Appendix hereto, page 1a, *infra*.

The memorandum decisions and judgment of the United States District Court for the Northern District of Georgia (Ward, D.J.) have not been reported. They are reprinted in the Appendix hereto, pages 23a, 25a, 27a and 49a, *infra*.

The disallowance decisions of the Grant Appeals Board of the U.S. Department of Health and Human Services have not been published. They are reprinted in the Appendix hereto, pages 54a, 62a, *infra*.

JURISDICTION

Petitioner brought this action under 5 U.S.C. § 702, and 28 U.S.C. § 2201, in the United States District Court for the Northern District of Georgia seeking a declaratory judgment and judicial review of an administrative decision disallowing $1,132,818.00 in federal funds. On July 9, 1991, the district court awarded summary judgment to Petitioner holding that Respondents lacked statutory authority to disallow the funds. This order is reprinted in the Appendix hereto, pp. 27a-48a, *infra*. Judgment was entered against Respondents on August 13, 1991. Appendix, p. 23a. Upon appeal by Respondents to the Court of Appeals, the Court on March 17, 1993, entered a judgment and opinion reversing the district court's judgment. *See* p. 1a, *infra*. A timely suggestion for rehearing en banc, was presented to the Court of Appeals. Under the rules of the Eleventh Circuit, a suggestion of rehearing en banc is treated as a petition for rehearing before the original

panel. Eleventh Cir. R. 35-6. The Court of Appeals denied rehearing and rehearing en banc on June 3, 1993. This order is reprinted in the Appendix hereto, p. 21a, *infra*.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 3029(a):

> Payments of grants or contracts under this subchapter may be made (after necessary adjustments resulting from previously made overpayments or underpayments) in advance or by way of reimbursement, and in such installments, as the Commissioner may determine.

42 U.S.C. § 3027(d):

Whenever the Commissioner, after reasonable notice and opportunity for a hearing to the State agency, finds that –

(1) the state is not eligible under Section 3025 of this title,

(2) the State plan has been so changed that it no longer complies substantially with the provisions of subsection (a) of this section, or

(3) in the administration of the plan there is a failure to comply substantially with any such provision of subsection (a) of this section,

the Commissioner shall notify such State agency that no further payments from its allotments under section 3024 of this title and section 3028 of this title will be made to the State (or, in the Commissioner's discretion, that further payments to the State will be limited to projects under or portions of the State plan not affected by such failure), until the Commissioner is satisfied that there will no longer be any failure to comply. Until the Commissioner is so satisfied, no further payments shall be made to such State from its allotments under section 3024 of this title and section 3028 of this title (or payments shall be limited to projects under or portions of the State plan not affected by such failure). The Commissioner shall, in accordance with regulations the Commissioner shall prescribe, disburse the funds so withheld directly to any public or nonprofit private organization or agency or political subdivision of such State submitting an approved plan in accordance with the provisions of this section. Any such payment shall be matched in the proportions specified in section 3024 of this title.

STATEMENT OF THE CASE

The Office of Aging, an internal division of the Petitioner, is the state agency which has been designated to administer grant-in-aid funds disbursed under the Older Americans Act, 42 U.S.C. § 3000 *et seq*. The Older Americans Act was enacted by Congress in recognition of the traditional concept of the inherent dignity of the individual in society and was intended to assist older people *inter alia*, in securing full and free enjoyment of adequate retirement income, the best possible physical and mental

health, and participation in meaningful activity within the widest range of civic, cultural, education and recreational activities. 42 U.S.C. § 3001.

Under the Older Americans Act, the responsible state agency is assisted in fulfilling these objectives by an area agency on aging whose geographic scope is determined by the distribution of older individuals in a state, the need for services, social need of affected individuals, and the distribution of available resources. 42 U.S.C. § 3025(a)(1)(E). In accordance with the Act, the Petitioner has divided the state into 18 geographic service delivery areas which are managed by an area agency on aging. Only one of these 18 sub-state agencies, the Atlanta Regional Commission Area Agency on Aging (hereinafter "ARC-AAA"), is involved in this case. The ARC-AAA serves the seven county Atlanta metropolitan area.

In 1984, the Office of the Inspector General of HHS conducted a review of the Petitioner's administration of Title III funds under the Older Americans Act and concluded that the ARC-AAA had sound financial management. A quarterly assessment of the Georgia program conducted December 10-14, 1984 disclosed no significant concerns. On April 12, 1985, the region administrator, Mr. Frank Nicholson, provided the Petitioner with a copy of the January, 1985 Region IV Administration on Aging Administrative Review of Area Agencies on Aging "In House" Operations in Georgia which questioned the use of certain funds for nutrition administration at the area agency on aging level. On May 13, 1985, the Petitioner responded to this review and maintained that its use of the funds was correct.

In an effort to resolve this dispute, the parties agreed to meet on May 15, 1985. At that meeting, the Petitioner agreed, commencing July 1, 1985, not to use Title III C-1 or C-2 funds at the area agency level unless the area agency was a nutrition service provider, even though it still believed the practice to be correct. The Petitioner was also informed that no budgetary changes were required to compensate for the current fiscal year funds if the Petitioner changed its practice as agreed. The Petitioner did in fact change its practice to conform to HHS' view of the law, even though it still disagreed with HHS' position. The Petitioner also agreed to allow HHS to conduct two on-site reviews of area agencies on aging.

To this point, HHS had never questioned the method by which Petitioner satisfied the requirement that a state supply 25 percent of its administrative funding from non-federal sources. 42 U.S.C. §§ 3024(d)(2); 3029(b). Neither was Petitioner's use of "donated space" as a form of in-kind match mentioned during the scheduling of the on-site reviews. Nevertheless, this issue was raised during the review of the two area agencies and became a part of the disputed disallowance.

The review of the ARC-AAA was conducted July 15-19, 1985. HHS found no areas of non-compliance with the other area agency reviewed. However, on January 14, 1986, Mr. Nicholson notified the Petitioner that HHS was proposing a disallowance in the amount of $1,132,818.00 due to non-compliance with the Older Americans Act. The issue of the allowability of the non-federal match used by the Petitioner was raised for the first time on January 14, 1986.

On August 18, 1986, then Acting Commissioner on Aging Carol Fraser Fisk, of the U.S. Department of Health and Human Services notified the Petitioner that the Administration on Aging intended to disallow $1,132,818.00 in federal financial participation under the Older Americans Act from three past fiscal years, July 1, 1982 through June 30, 1985. The Petitioner sought reconsideration of that decision, but was advised that the decision was final in a letter of October 7, 1986. The Petitioner filed a notice of appeal with the Departmental Grant Appeals Board on September 15, 1986, to obtain review of the decision. The Board is the administrative review arm of HHS relative to federal-state grant programs. Both parties briefed the issues before the Board.

On May 21, 1987, the Board issued its decision upholding the disallowance of funding in its entirety. Appendix, p. 62a. A request for reconsideration of the Board's decision was denied by order of June 25, 1987. Appendix, p. 54a. Following the denial of reconsideration, the Petitioner filed a complaint in the United States District Court for the Northern District of Georgia, Atlanta Division, for declaratory judgment and for judicial review of the disallowance. Upon resolution of certain preliminary procedural issues, the Petitioner filed a motion for partial summary judgment on the question of HHS' statutory authority to disallow funds. The basis of the motion was that the term "disallowance" does not appear anywhere in the Older Americans Act and that Congress had provided an alternative method for assuring compliance with federal law. Ultimately, the parties filed cross-motions for summary judgment both on the threshhold statutory question, and on the merits.

By Order of July 9, 1991, the District Court entered summary judgment in favor of the Petitioner finding that HHS lacked statutory authority to disallow the disputed funds. The Court concluded that its ruling on this issue was dispositive of the case. On August 13, 1991, the Court entered final judgment in favor of the Petitioner, but reserved any consideration of the merits of the case pending the outcome of any appeal which might be prosecuted by HHS. HHS filed a notice of appeal to the Court of Appeals for the Eleventh Circuit following entry of judgment.

Upon appeal by Respondents to the Court of Appeals, the Court on March 17, 1993, entered a judgment and opinion reversing the district court's judgment. *See* p. 1a, *infra*. A timely suggestion for rehearing en banc, was presented to the Court of Appeals. The Court of Appeals denied rehearing and rehearing en banc on June 3, 1993. This order is reprinted in the Appendix hereto, page 21a, *infra*.

REASONS FOR GRANTING THE WRIT

I. CONGRESS SELECTED A REMEDY FOR ASSURING THAT STATE AGENCIES COMPLY WITH FEDERAL LAW AND THE COURT OF APPEALS' IMPLICATION OF AUTHORITY TO DISALLOW FUNDS ALTERS THE CAREFUL BALANCE WHICH CONGRESS STRUCK IN THE LEGISLATION.

Across the United States, state agencies serving the elderly daily struggle to assure that vital services are made available to the nation's senior citizens. The myriad

statutory and regulatory conditions imposed by Respondents upon funds utilized for this purpose are difficult enough to deal with on an express basis, much less by implication. Unless this Court clarifies the exact powers of Respondents under the Older Americans Act, they will continue to assert powers which exceed the statutory mandate which Congress has provided for this program. This problem is of national scope and deserving of the guidance of this Court.

Invocation of the "plain meaning" rule to sustain a statutory construction is perhaps the surest sign that the asserted meaning is anything but plain. In this case, the Court of Appeals concluded that the Respondents possessed statutory authority to disallow federal funds even though the words "disallow" or "disallowance" were never used once by Congress in the entire statutory scheme. Neither does any legislative history support such an interpretation of the Older Americans Act. Undaunted, the Court of Appeals found the term implied from the language of 42 U.S.C. § 3029(a) and relied heavily on the decision of this Court in *Bell v. New Jersey*, 461 U.S. 773 (1983) to sustain that reading. Yet, an examination of that decision illustrates why the plain meaning of a statute is dependent upon the climate of its enactment and why this important first impression question of federal law should be decided by this Court in favor of the Petitioner.

When construing a law, this Court cautions that "[o]ver and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. Nat. Bank of*

Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. ___, 113 S.Ct. 2173, 2182, 124 L.Ed.2d 402, 418 (1993), *quoting United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849). The Court has further directed that "[i]n ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *McCarthy v. Bronson*, ___ U.S. ___, 111 S.Ct. 1737, 1740, 114 L.Ed.2d 194, 200 (1991), *quoting K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988).

Given these admonitions, Petitioner believes that the Court of Appeals erred in mechanically treating the language of 42 U.S.C. § 3029(a) as identical to that interpreted by this Court in *Bell v. New Jersey*, 461 U.S. 773 (1983), and applying that holding here. As discussed *infra*, in Division II of the petition, at least one significant difference exists between the two statutory provisions: the ability to retroactively recoup federal funding. Section 3029(a), relied on by Respondents here, does not contain any retroactivity language, whereas the Elementary and Secondary Education Act interpreted in *Bell, supra*, expressly discussed adjustment of payments "(whether or not in the same fiscal year)". *Bell, supra*, at 782, *quoting* 20 U.S.C. § 241g(a)(1) (1970). Other differences can be found in the Congressional treatment of the distinct programs.

The statutory authority on which Respondents ordinarily rely for disallowance decisions is 42 U.S.C. § 1316(d). This Court has recognized that the language of that statute contains adequate authority for a disallowance. *Bowen v. Massachusetts*, 487 U.S. 879 (1988). However, Section 1316(d) is unavailable to Respondents

in this case since it is expressly limited to certain subchapters within Chapter 7 of Title 42, the Social Security Act, whereas the program at issue here falls under Chapter 35 of Title 42, Programs for Older Americans. As the district court held, a review of Chapter 35, 42 U.S.C. § 3000 *et seq.* discloses no similar provision which would authorize Respondents to disallow federal funds. Appendix, pp. 45a, 47a. *Compare* 42 U.S.C. § 1396b(d)(5) (expressly incorporating Section 1316(d)) *with* 42 U.S.C. §§ 3027, 3029 (no reference to disallowances).

The enforcement mechanism made available to Respondents by Congress is contained in 42 U.S.C. § 3027(c),(d),(e). Collectively, those Code sections provide that whenever the Commissioner of the Administration on Aging determines that a state is not eligible for federal financial participation, he shall notify the state agency that no further payments from its allotments under Section 3024 and Section 3028 will be made until he is satisfied that there will no longer be any failure to comply. *See e.g. Commissioner on Aging of State of Alabama v. Finch*, 430 F.2d 667 (5th Cir. 1970). In Respondents' discretion, withholding of funds can be either total or partial depending upon the level of non-compliance. 42 U.S.C. § 3027(d). Funds withheld may be re-distributed to other qualifying states or agencies. 42 U.S.C. § 3024(c). Thus, Congress has provided a comprehensive remedy. This type of enforcement mechanism is commonly referred to as a "plan conformity" remedy. However, the Older Americans Act makes no express provision for a disallowance.

A judicially recognized distinction exists between a disallowance and a plan non-compliance sanction. *See*

Bowen v. Massachusetts, 487 U.S. 879 (1988). This distinction was explored in *Georgia Dep't of Medical Assistance v. U.S. Dep't of Health and Human Services*, 708 F.2d 627 (11th Cir. 1983). Under the standards enunciated in that case, it is clear that the funds at issue here were disallowed, not the subject of a "plan conformity" sanction under Section 3027(d). Indeed, no plan non-compliance problem is presented here since Respondents concede that Petitioner changed its treatment of the disputed funds in a good faith effort to conform to the federal policy first asserted immediately prior to the disallowance.

Having conceded below that a disallowance was not expressly made available by Congress, Respondents argued alternatively that the language of 42 U.S.C. § 3029 implied authority to disallow funds permitting them to do indirectly what the law did not allow directly. The Court of Appeals accepted this argument, largely based upon a mechanical application of the decision of this Court in *Bell v. New Jersey*, 461 U.S. 773 (1983). Since the decision in *Bell* ten years ago, this Court has been more circumspect in its interpretation of statutes and its expectation that Congress can, and must, speak with a clear voice when imposing conditions upon the states under the Spending Clause. *See generally Suter v. Artist M. et al.*, ___ U.S. ___, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992); *School Bd. of Nassau Co., Fla. v. Arline*, 480 U.S. 273, 289 (1987) (Rehnquist, C.J. and Scalia, J. dissenting); *Atascadero State School & Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985). Even though these later cases suggest that *Bell* may have lost some of its vitality, given the present circumstances *Bell* need not control the outcome of this case as the Court of Appeals believed.

In *Bell*, this Court interpreted a provision of the Elementary and Secondary Education Act of 1965 (ESEA), as amended 20 U.S.C. § 2701 *et seq.*, and allowed the federal government to recoup funds from New Jersey and Pennyslvania. Significantly, this Court relied upon the legislative history of the ESEA as well as an amendatory act which expressly provided for recoupment of funds to support its interpretation of the statute. *Id.* at 780, 783. By contrast, here Respondents conceded that there is neither legislative history supporting nor a statute expressly authorizing a disallowance. Examination of the legislative history in *Bell* highlights this distinction.

As is evident from the opinion in *Bell*, Congress unmistakably intended that funds should be recouped under the ESEA, and even defeated an amendment to the legislation which would have prevented collection of the funds. *Id.* at 783-85 & n.12. There are no similar statements in the legislative history of the Older Americans Act, nor any subsequent legislation here. Far from expressing concern that states were misusing funds, Congress repeatedly praised the Older Americans Act and the way it was being administered. That the language in *Bell* might not have passed muster absent supporting legislative history is demonstrated in the concurrence of Justice White who wrote:

> The Secretary will no doubt be pleased with today's holding, but I note that he must have thought the authorizing language of this provision was not so 'plain,' since his lawyers deemed it worthy of no more than passing mention in his brief . . . Specifically, I would have held that the 1978 Amendments [Cit. Om.] which unequivocally state that the Secretary

> may administratively recoup misspent Title I funds, should be applied retroactively.

Bell, 461 U.S. at 793 (White, J. concurring). Accordingly, Petitioner submits that the language of Section 3029(a) is not so plain as the Court of Appeals suggested in its opinion.

Moreover, the decision of the Court of Appeals permitting a disallowance to be used notwithstanding the absence of statutory authority conflicts in principle with the decision of the Seventh Circuit in *Community and Economic Development Association v. Suburban Cook County*, 770 F.2d 662 (7th Cir. 1985). In *CEDA*, the court declined to allow an existing service provider to assert an implied right of action under the Older Americans Act. *Id.* The court buoyed this determination by recognizing that service providers had an existing remedy under 42 U.S.C. § 3027(a)(5). *Id.* at 666. Buttressing its decision, the court concluded:

> Congress has struck the balance between the interests of service providers and the other parties affected by the OAA. [Cit.Om.] The legislature is not required to provide a remedy for every violation of federal law, [cit.om.], and the judiciary may not extend the coverage of the OAA simply because it might disagree with the legislature's allocation of rights and remedies. [Cit.Om.]

Id. at 667.

If no reason exists for implying a private right of action when an express remedy exists under the Older Americans Act, it would be unfair and unjust to allow the

Respondents to travel under an implied power to disallow federal funds when Section 3027 expressly accords them a plan conformity sanction to remedy alleged noncompliance with the act. Therefore, the decision of the Court of Appeals below conflicts in principle with the rationale expressed by the Seventh Circuit in the *CEDA* case. This Court has recognized that a conflict in principle may justify review by this Court. *See e.g. Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1969).

II. ALLOWING THE DEPARTMENT OF HEALTH AND HUMAN SERVICES TO RETROACTIVELY DISALLOW FEDERAL FUNDS WITHOUT EXPRESS STATUTORY AUTHORIZATION CONFLICTS WITH DECISIONS OF THIS COURT AND WITH THE SECRETARY'S OWN INTERPRETATION OF SIMILAR LANGUAGE IN THE MEDICARE CONTEXT.

Should the Court find that its decision in *Bell v. New Jersey*, 461 U.S. 773 (1983), authorizes an adjustment of federal funding in the form of a disallowance, Respondents must still justify why such an adjustment may include past fiscal years without any retroactivity language in Section 3029(a). It is undisputed that the disallowance of funds in this case spans three state fiscal years: July 1, 1982 through June 30, 1985. Even if Section 3029(a) is interpreted to permit Respondents to adjust funding to the Petitioner, the statute is devoid of any language which would permit that adjustment to extend beyond the then current fiscal year. By refusing to address this significant problem, the Court of Appeals

permitted retroactive adjustment of funds contrary to the decisions of this Court in *Good Samaritan Hosp. v. Shalala*, ___ U.S. ___, 113 S.Ct. 2151, 124 L.Ed.2d 368 (1993), and *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988).

A comparison of the statutory provision interpreted in *Bell v. New Jersey*, 461 U.S. 773 (1983), with Section 3029(a) at issue here easily distinguishes that case. In *Bell*, this Court approved a multi-fiscal year adjustment on the strength of the following statutory language:

> Such payments shall take into account the extent (if any) to which any previous payment to such State educational agency under this title **(whether or not in the same fiscal year)** was greater or less than the amount which should have been paid to it.

20 U.S.C. § 241g(a)(1) (1970) (Emphasis Supplied). Thus, Congress, and presumably this Court, approved the multi-year adjustment based upon the express statutory language. No such language is contained in Section 3029(a) relied upon by Respondents.

That Code section provides:

> Payments of grants or contracts under this subchapter may be made (after necessary adjustments resulting from previously made overpayments or underpayments) in advance or by way of reimbursement, and in such installments, as the Commissioner may determine.

42 U.S.C. § 3029(a). The absence of multi-year adjustment language is self-evident.

Neither should it be implied. Petitioner argued below that the reason for this Code section was to allow the

Respondents to adjust the funding to states during the then current fiscal year. In a case decided just two months ago by the Court, Secretary Shalala adopted this view and argued that virtually identical language in the Medicare statute "addresses periodic adjustments to be made **during the course of the fiscal year**". (Emphasis Supplied). *Good Samaritan Hosp. v. Shalala*, ___ U.S. ___, 113 S.Ct. 2151, 2158, 124 L.Ed.2d 368, 379 (1993) (referring to 42 U.S.C. § 1395g(a)).

Given the Secretary's recent position on such language, the Court of Appeals' decision allowing a disallowance to include more than one fiscal year is not only inconsistent with the express statutory language, but with the Secretary's own view of what that language should mean. Throughout this litigation, Respondents have called for deference to their interpretation of the statutory scheme citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Having recently argued to this Court that at its broadest her authority extends to year-end book balancing, the Secretary should be taken at her word.

Interpreting the language of Section 3029(a) to be limited to adjustments in the current fiscal year gives effect to the entire legislative scheme. Assuming *arguendo* that the Code section was meant to deal with disallowances and not just funding errors, the fact that both Section 3027(d) and Section 3029(a) speak in terms of "payments" suggests that these statutory provisions were meant to operate in tandem. Thus, if non-compliance during the current fiscal year is found under Section 3027, then a current fiscal year adjustment may be made under Section 3029; but no further.

Retroactivity in the law is not favored. In *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988), this Court was called upon to interpret the Medicare Act to determine whether the U.S. Department of Health and Human Services (hereafter "HHS") could engage in retroactive rulemaking. The Court recognized that in the context of the Medicare Act, HHS had express authority for making retroactive corrective adjustments citing 42 U.S.C. § 1395x(v)(1)(A):

> Such regulations shall . . . (ii) provide for the making of suitable **retroactive corrective adjustments** where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive.

Id. at 209, (Emphasis Supplied). These adjustments represent a year-end balancing of the monthly installments received by providers with the aggregate due them for the year. *Id.* at 213. *Accord, Good Samaritan Hosp. v. Shalala*, ___ U.S. ___, 113 S.Ct. 2151, 2158, 124 L.Ed.2d 368, 379 (1993).

At the outset, this Court is urged to contrast the statutory language in the Medicare Act which expressly authorizes retroactive adjustments with that found in the Older Americans Act, 42 U.S.C. § 3029(a), which contains no such language. The absence of statutory authority to retroactively adjust payments under the Older Americans Act undercuts the Court of Appeals' conclusion that Respondents have unlimited authority to disallow funds for prior fiscal years. This Court relied upon this same rationale to preclude HHS from engaging in retroactive rulemaking in *Georgetown University Hosp., supra.*

According to the Court:

> Any light that might be shed on this matter by suggestions of legislative intent also indicates that no such authority was contemplated. In the first place, **where Congress intended to grant the Secretary the authority to act retroactively, it made that intent explicit.** As discussed above, § 1395x(v)(1)(A)(ii) directs the Secretary to establish procedures for making retroactive corrective adjustments; in view of this indication that Congress considered the need for retroactive agency action, **the absence of any express authorization for retroactive cost-limit rules weighs heavily against the Secretary's position.**

Bowen v. Georgetown University Hosp., 488 U.S. 204, 213-14 (1988) (Emphasis Supplied). Accordingly, the Court invalidated HHS' retroactive action in that case, just as the Court of Appeals should have done here since the Older Americans Act does not convey Congress' intent to allow retroactive adjustments.

The Eleventh Circuit previously considered the retroactivity issue in the Medicare context as well. In *Tallahassee Mem. Regional Med. Ctr. v. Bowen*, 815 F.2d 1435 (11th Cir. 1987), the Court upheld reimbursement to hospital providers over claims by HHS that a regulation should retroactively bar that reimbursement. While acknowledging that HHS had authority to make retroactive adjustments under 42 U.S.C. § 1395x(v)(1)(A)(ii), the Court of Appeals joined the Sixth Circuit in finding that HHS' power to make retroactive rules was limited. According to the opinion, "[t]hat section could be read to

be limited to corrective adjustments for individual hospitals **in the currently reviewed cost year.**" *Id.* at 1453 n. 36 (Emphasis Supplied).

The panel expressed great concern that if the power of HHS was not limited, it "would be able to reduce the amount of reimbursement the hospitals are due long after the hospitals actually receive and spend the money." *Id.* at 1454. That very concern is implicated here where Respondents propose to disallow funding for prior fiscal years when those funds have long been disbursed to support programs for elderly. The Court of Appeals was unwilling to accept such a broad power in *Tallahassee Mem. Regional Med. Ctr.*, and should not have done so in this appeal.

Due to the absence of any express authority for retroactive adjustments, the Department submits that the Court of Appeals erred in concluding that the plain language of 42 U.S.C. § 3029(a) authorized a disallowance which included prior fiscal years. Because its decision permitting retroactive funding adjustments conflicts with precedent from this Court, with the Court of Appeals' own precedent, and that of another circuit, this Court is urged to correct that error. The Older Americans Act has never before been interpreted by this Court and permitting review in this case would assure that the discordant view advanced by the Court of Appeals will not become a part of the pedigree of this statute.

Assuming, without conceding, that upon remand the district court should uphold the disallowance for the then current fiscal year, Petitioner would only be liable for repayment of $407,515.00, not $1,132,818.00 as originally

claimed if its position as to retroactivity is sustained: a savings to Georgia's elderly of $725,303.00. While this sum may seem insubstantial in comparison to the resources this Court must apportion on a daily basis, it is a significant sum to elderly Georgians who must depend upon the Petitioner for assistance in making ends meet.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant a writ of certiorari to review the judgment of the Eleventh Circuit.

Respectfully submitted,

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James G. LEDBETTER, Ph.D., in his official capacity as Commissioner of the Georgia Department of Human Resources, Plaintiff-Appellee,

v.

Donna SHALALA, Secretary of the Department of Health and Human Services; Carol Fraser Fisk, Commissioner of Administration on Aging, and Frank Nicholson, Region IV Program Director of Administration on Aging, Departmental Grant Appeals Board, Defendants-Appellants.

No. 91-8914.

United States Court of Appeals,
Eleventh Circuit.

March 17, 1993.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH, Circuit Judge, CLARK, Senior Circuit Judge, and PITTMAN*, Senior District Judge.

PITTMAN, Senior District Judge:

This is an appeal from a summary judgment in favor of plaintiff-appellee James G. Ledbetter, in his official

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*Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

capacity as the Commissioner of the Georgia Department of Human Resources (hereinafter referred to as "the state"). The defendants-appellants are Donna Shalala[1] (Secretary of the Department of Health and Human Services), Carol Fraser Fisk (Commissioner of Administration on Aging), and Frank Nicholson (Region IV Program Director of the Administration on Aging), and the Departmental Grant Appeals Board [hereinafter collectively referred to as "the agency"].

I. *Background*

This action involves title III of the Older Americans Act, Public Law 89-73, as amended, 42 U.S.C. § 3021, *et seq.* [hereinafter "OAA" or "the act"], a brief explanation of which will facilitate discussion of the procedural history of this case.

A. The Older Americans Act

Under the act, the federal government provides assistance to states for the development and administration of a comprehensive system of services for the elderly. *See* 42 U.S.C. §§ 3001, 3003. The Administration on Aging, which is part of the United States Department of Health and Human Services, is the federal agency primarily responsible for the administration of the act. 42 U.S.C. § 3011. Title III of the act provides for state and community programs on aging. Under title III, the agency uses a

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[1] Pursuant to *Fed.R.Civ.P.* 25(d), Donna Shalala was substituted as a party for his [sic] predecessor as Secretary of HHS, Louis W. Sullivan.

statutory formula to allocate grant funds to state and local programs that submit plans approved by the Commissioner of the Administration on Aging. 42 U.S.C. §§ 3024, 3025(a)(1).

The Georgia Office of Aging [hereinafter "GOA"], which is part of the Georgia Department of Human Resources [hereinafter "DHR"], is responsible for the implementation of title III programs in Georgia. DHR has established 18 separate planning and service areas for OAA programs within the state, and OAA programs in each of these areas are administered by an Area Agency on Aging that is designated by the GOA. Among the responsibilities imposed upon each area agency is an obligation to develop an area plan in accordance with federal and GOA requirements. The GOA is responsible for reviewing the area plans to ensure that they satisfy federal requirements. 42 U.S.C. § 3027(a)(2); 45 C.F.R. § 1321.45(a)(4). This responsibility includes ensuring that the costs and activities for which federal and state grant funds are obligated are allowable under the title III program and the cost principles promulgated in regulations pertaining to the administration of grant funds. 45 C.F.R. Part 74.

During the period relevant to the case at bar, the act provided that no more than 8.5% of a state's allotment of title III funds could be used to pay for the cost of area plan administration and that federal funds could not be used to pay for more than 75% of such costs. 42 U.S.C. § 3024(d)(1)(A). The 25% of administrative expenses that was to come from non-federal funds could be cash or "in-kind" contributions, but if the contribution was in-kind, it had to satisfy guidelines that established when in-kind

contributions were "allowable." 45 C.F.R. §§ 74.53(e), 1321.201.

B. Factual and Procedural History

The Atlanta Regional Commission [hereinafter "ARC"] is the area agency on aging for the metropolitan Atlanta area. Area plans were submitted by the ARC for the fiscal years commencing July 1, 1982, July 1, 1983, and July 1, 1984, respectively. The area plans were reviewed and ultimately approved by GOA. The ARC received allocations of title III grant funds to implement administration of its area plan for these fiscal years.

In 1985, the agency reviewed ARC's use of title III funds for these years and concluded that certain federal funds had been misused by ARC. The agency notified the state that the agency was considering disallowance of those funds. After the state defended its use of the funds to the agency, the Commissioner of the Administration on Aging disallowed the funds, and the commissioner's decision was affirmed by the Departmental Grant Appeals Board. The state then filed suit challenging the agency's statutory authority to order such a disallowance.

In early 1985, the agency conducted an administrative review of all the area agencies in Region IV, which included ARC. The review indicated that there were problems with the expenditure of title III funds in the state. Specifically, the review indicated that certain federal funds were being used incorrectly to fund "nutrition administration" on the area agency on aging level. The state was apprised of the agency's concern with the "nutrition administration" expenditures in a letter from

defendant/appellant Frank Nicholson dated April 12, 1985. *Admin.Appeal File* at 132. By letter dated May 13, 1985, the state responded and maintained that its use of the funds was correct. *Id.* at 142. Nicholson and Fred McGinnis, director of the GOA, met on May 15, 1985, to discuss the disputed expenditures. At this meeting, the parties agreed that beginning in the fiscal year commencing July 1, 1985, the state would no longer fund "nutrition administration" in the manner objected to by the agency. *Id.* at 144. The state also agreed to a review by the agency of the use of title III funds by ARC and another area planning agency. The state, however, did not concede that the disputed use was incorrect.

The review of ARC was conducted July 15-19, 1985.[2] By letter dated January 14, 1986, Nicholson informed McGinnis that the agency's regional office was proposing to the Commissioner of the Administration on Aging that $1,132,818.00 of federal funds allocated to ARC during the 1982-83, 1983-84, and 1984-85 fiscal years be disallowed. $728,361.00 of these funds were related to the expenditures for "nutrition administration." The other $404,457.00 of the proposed disallowance related to ARC's use of in-kind contributions to meet the requirement that 25% of the cost of area administration be paid from non-federal sources: the agency found that ARC used $134,819.00 of unallowable in-kind contributions to match federal funds and that therefore the federal funds used to match the unallowable contributions were to be disallowed. The agency contributed three dollars for each

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[2] The review of the other area agency found no non-compliance and is not challenged in this action.

one dollar of non-federal contribution, so the proposed amount to be disallowed was $404,457.00 (the amount of non-federal contribution found to be unallowable multiplied by three). The state contends that the January 14 letter contained the first mention by the agency of the issue of the allowability of the disputed in-kind contributions.

Nicholson's letter informed McGinnis that McGinnis had the opportunity to review and comment on the proposed disallowance. By letter dated March 14, 1986, McGinnis responded with arguments that the proposed disallowance was improper because the expenditures for nutrition administration were proper and because the in-kind contributions were allowable.

On August 18, 1986, appellee Ledbetter received a letter from appellant Fisk, then Acting Commissioner of the Administration on Aging, that was virtually identical to the January 14 letter sent to McGinnis for review and comment. The letter informed Ledbetter that $1,132,818.00 was being disallowed for the reasons discussed above. The August 18 letter contained the following statement that was also included in the letter dated January 14:

> You have 30 days from the receipt of this letter to elect one of the three options to repay the $1,132,818 in disallowed costs. The three options are:
>
> > (1) submit a check, drawn from non-Federal funds, payable to the Department of Health & Human Services;

> (2) adjust the SF-269, Financial Status Report for the fiscal year allotment in question. The obligations on line K and the outlays on line G are to be reduced which will reflect an unobligated balance on line M for the appropriate fiscal years; and
>
> (3) by a reduction in your current and/or future fiscal year Federal allotment.

The letter informed Ledbetter that it was the final decision of the commissioner and that the state had the right to appeal the disallowance of the costs to the Departmental Grant Appeals Board.

By letter dated September 5, 1986, the state requested that Commissioner Fisk reconsider the disallowance because the costs to be disallowed were actually proper. The state also argued that the disallowance was inconsistent with the prior practices of the agency and was contrary to verbal commitments made by the agency because the agency had previously approved of such expenditures. By letter dated September 12, 1986, appellant Fisk responded that the letter dated August 14 was the final decision of the commissioner and that any appeal would have to be submitted to the Departmental Grant Appeals Board.

The state filed notice of appeal to the Grant Appeals Board on September 15, 1986. As grounds for appeal, the state reiterated its arguments that the disputed expenditures were proper and that the costs disallowed had previously been approved by the agency. The state also argued that the disallowance was inconsistent with the purposes of the act, that the final decision was arbitrary and capricious, and that the disallowance action was not

taken in strict compliance with agency procedures. The state submitted a rather lengthy brief devoted almost entirely to the argument that the agency should be estopped from disallowing the disputed costs because the agency had previously accepted and approved the costs.

On May 21, 1987, the Grant Appeals Board rejected the state's estoppel argument and found that the disputed costs were properly disallowed. The appeals board affirmed the commissioner's decision to disallow the $1,132,818.00. The board reaffirmed the disallowance on June 25, 1987.

On February 23, 1988, the state filed a petition for judicial review of the disallowance in the United States District Court for the Northern District of Georgia. Both the agency and the state filed motions for summary judgment. On July 9, 1991, the district court entered an order granting the state's motion for summary judgment and denying the agency's motion for summary judgment. The district court's order will be discussed *infra*. On August 13, 1991, judgment in favor of the state and against the agency was entered. The agency filed notice of appeal to this court on October 10, 1991.

II. *Discussion*

The grant of summary judgment in favor of the state was a final decision by the district court, and this court has jurisdiction pursuant to 28 U.S.C. § 1291.

The issue before this court is whether the agency has the right to recover funds from the state that were allocated to the state pursuant to title III but were spent in

violation of the requirements of title III.[3] Specifically, the issue is whether the agency has the statutory authority to recover the $1,312,818.00 that it purported to disallow through the administrative proceedings in this case. The district court's grant of summary judgment was based on its conclusion that, as a matter of law, the agency lacks such authority. This conclusion of law is subject to plenary review by this court. *Crockett v. Uniroyal, Inc.*, 772 F.2d 1524, 1528-29 (11th Cir.1985) (citing *Morrison v. Washington County, Alabama*, 700 F.2d 678 (11th Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983); *Federal Deposit Inc. Corp. v. Dye*, 642 F.2d 837, 841 (5th Cir. Unit B 1981)).

The district court held that the agency has no authority to disallow funds allocated under title III of the act because the exclusive enforcement mechanism available to the Commissioner of the Administration on Aging [hereinafter "the commissioner"] is contained in 42 U.S.C. § 3027(b), (c), and (d), which do not authorize recovery by the agency of funds previously misspent by the state. Section 3027(b) provides that the commissioner shall approve any state agency on aging plan that meets the requirements set out in 42 U.S.C. § 3027(a). Section 3027(b) also provides that the commissioner may waive certain requirements of Section 3027(a). Section 3027(c) provides that "[t]he commissioner shall not make a final

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[3] The district court did not reach the question of whether the funds at issue in this case were used in violation of the act. However, for the purposes of this appeal, this court will proceed on the assumption that the funds were so used.

determination disapproving any State plan, or any modification thereof, or make a final determination that a State is ineligible under section 305 [42 U.S.C. § 3025], without first affording the State reasonable notice and opportunity for a hearing." Section 3027(d) provides:

> Whenever the Commissioner, after reasonable notice and opportunity for a hearing to the State agency, finds that –
>
> (1) The state is not eligible under section 305 [42 U.S.C. § 3025],
>
> (2) the State plan has been so changed that it no longer complies substantially with any such provision of subsection (a) [42 U.S.C. § 3027(a)], or
>
> (3) in the administration of the plan there is a failure to comply substantially with any provision of subsection (a) [42 U.S.C. § 3027(a)],
>
> the Commission shall notify such State agency that no further payments from its allotments under section 304 [42 U.S.C. § 3024] and section 308 [42 U.S.C. § 3028] will be made to the State (or, in his [or her] discretion, that further payments to the state will be limited to projects under or portions of the State plan not affected by such failure), until he [or she] is satisfied that there will no longer be any failure to comply. Until he [or she] is so satisfied, no further payments shall be made to such State from its allotments under section 304 [42 U.S.C. § 3024] and section 308 [42 U.S.C. § 3028] (or payments shall be limited to projects under or portions of the State plan not affected by such failure). The

> Commissioner shall, in accordance with regulations he [or she] shall prescribe, disburse the funds so withheld directly to any public or nonprofit private organization or agency or political subdivision of such State submitting an approved plan in accordance with the provisions of section 307 [42 U.S.C. § 3027]. Any such payment shall be matched in the proportions specified in section 304 [42 U.S.C. § 3024].

The district court characterized the provisions of § 3027 as a "plain [sic] conformity" remedy that provides for a non-compliance sanction. The district court held that "[t]he only mechanism explicitly provided [in the act] is the plain [sic] conformity remedy and the only sanction is the non-compliance sanction."

The district court's characterization of the provisions of § 3027 as providing only a non-compliance sanction is correct. *See Georgia Dept. of Medical Assistance v. United States Dept. of Health & Human Servs.*, 708 F.2d 627, 628-30 (11th Cir.1983) (discussing the distinction between a disallowance and a non-compliance sanction). However, the district court's conclusion that § 3027 provides the agency's exclusive remedy is erroneous.

This court finds that, in addition to the prospective remedy provisions of § 3027, the act contains express provision for the agency to recover from the state title III funds misspent by the state in the past.

The state argues and the district court found that the agency's sole remedy is § 3027's prospective remedy whereby the agency can withhold funds from a state that does not comply with applicable requirements until the state brings its program into compliance. The state argues

that because the term disallowance is not used anywhere in title III[4], the actions of the agency in this case were not authorized by the act. The agency contends that 42 U.S.C. § 3029(a) expressly authorizes it to recover funds improperly received or spent by the state regardless of whether the magic word "disallowance" is used.

Section 3029(a) provides in pertinent part, that "[p]ayments of grants or contracts under this title [title III] may be made (*after necessary adjustments resulting from previously made overpayments or underpayments*) in advance or by way of reimbursement. . . . " 42 U.S.C. § 3029(a) (emphasis added). The Supreme Court of the United States has construed similar language as giving the federal government a right to recover federally allocated funds from a state that misuses the funds. *Bell v. New Jersey*, 461 U.S. 773, 782-83, 103 S.Ct. 2187, 2192-93, 76 L.Ed.2d 312, 321-22 (1983).

In *Bell*, New Jersey and Pennsylvania received grants from the federal government under title I of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. § 2071, *et seq.* (1976 & Supp. V). "Title I created a program designed to improve the educational opportunities available to disadvantaged children." *Bell*, 461 U.S. at 776, 103 S.Ct. at 2189. Under title I, the Department of Education provided grants to state educational agencies, and the state educational agencies in turn provided grants to local educational agencies. The Department of Education audited New Jersey and Pennsylvania

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[4] Disallowances are explicitly authorized under 42 U.S.C. § 1316(d), but that section is not contained in title III and by its own terms does not apply to title III programs.

to ensure compliance with the ESEA, and the auditors found that both states had misapplied title I funds. *Id.* at 777, 103 S.Ct. at 2190. The states requested review of the determination, and the Education Appeal Board modified the findings of the auditors and assessed a deficiency of $1,031,304 against New Jersey and a deficiency of $422,424.29 against Pennsylvania. The order of the appeal board subsequently became final and both states filed timely petitions for review in the United States Court of Appeals for the Third Circuit. The Third Circuit held that the Department of Education did not have authority to issue the orders. *Id.* (citation omitted).

Before the Supreme Court, both New Jersey and Pennsylvania argued that "the Secretary's sole remedy for noncompliance was prospective: he could withhold funds from a State that did not comply, until the State brought its program into compliance or he could deny applications for funds for noncomplying programs." *Id.* at 780-81, 103 S.Ct. at 2192 (internal citation omitted). In finding that the ESEA "contemplated that States misusing federal funds would incur a debt to the Federal Government for the amount misused," the court considered section 207(a)(1) of the ESEA, which originally provided:

> The Commissioner shall, subject to the provisions of § 208 [dealing with inadequate appropriations], from time to time pay to each State, in advance or otherwise, the amount which the local educational agencies of that State are eligible to receive under this part. Such payments shall take into account the extent (if any) to which any previous payment to such State educational agency under this title (whether or not

> in the same fiscal year) was greater or less than the amount which should have been paid to it.

Bell, 461 U.S. at 782, 103 S.Ct. at 2193 (quoting Pub.L. 89-10, 79 Stat. 32). The Court found that this provision "gives the Federal Government a right to the amount of any funds overpaid. The plain language of the statute recognizes the right, and the legislative history supports that natural reading." *Id.* at 783, 103 S.Ct. at 2193 (internal footnote omitted).

This court finds that *Bell* is dispositive of this case and that the plain language of 42 U.S.C. § 3029(a) gives the agency the right to recover from the state any amount of funds paid to the state that were not used in compliance with the applicable federal requirements. The state argues that the instant case is distinguishable from *Bell* because in this case there is no legislative history that supports the conclusion that § 3029(a) gives the state the right to recover misused funds. The state is correct that there is no legislative history establishing that this reading of § 3029(a) is correct, but that fact is rendered moot by this court's finding that the agency's right to recover misused funds is found in the plain language of § 3029(a). Because this court finds that the intent of Congress to give the agency the right to recover misused funds is clearly and unambiguously expressed by the plain language of § 3029(a), "that is the end of the matter." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694, 702-03 (1984). The Court in *Bell* stated that the legislative history supported the court's construction of the plain meaning of the ESEA provision, but the Court in no way implied that such support was necessary for a finding that the plain

language of the provision gave the federal government the right to recover misused funds in that case. In fact, to accept the state's argument would render the plain meaning rule absolutely meaningless.

This court is not impressed by the state's argument that even if disallowance is a proper remedy for the agency to employ, the disallowance in this case was incorrect because the agency did not provide the notice required by 42 U.S.C. § 3027. The state argues that "[t]here was no overpayment to recoup in this case under 42 U.S.C. § 3029(a), because HHS did not properly notify the Department that it was out of compliance under § 3027(c)." Section 3027(c) provides that "[t]he Commissioner shall not make a final determination disapproving any State plan, or modification thereof, or make a final determination that a State is ineligible under section 305 [42 U.S.C. § 3025], without first affording the State reasonable notice and opportunity for a hearing."

The state is correct that this section gives it a right of notice and opportunity to be heard, but reading section 3027(c) in conjunction with section 3027(d), quoted *supra*, makes it clear that the notice and opportunity to be heard referred to in § 3027(c) is notice and opportunity to be heard with regard to the prospective remedy provided in section 3027(d). The agency's action in this case is not an attempt to employ the prospective remedy provided in § 3027(d) but is rather an attempt to recover funds allocated and misspent in the past. To accept the state's argument would impose on the agency the obligation to detect that funds were going to be misused before they were misused. It is unlikely that Congress intended to impose such a duty on the agency. This court finds it

difficult to conceive that Congress would authorize funds for specific purposes but would provide no action to recover the funds if the funds were misused or otherwise improperly spent. This court rejects the state's argument that there was no overpayment to be recovered under § 3029(a) because of the agency's purported failure to provide the notice required by § 3027(c).[5]

The state also argues that § 3029(a) only gives the agency the right to make "necessary adjustments resulting from previously made overpayments or underpayments" that were made inadvertently or accidentally. This argument is not persuasive. As the agency correctly

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[5] The state urges that *Turner v. Ledbetter*, 906 F.2d 606 (11th Cir.1990) is dispositive of the notice issue in this case. The *Turner* court held that the State of Georgia could not recoup certain funds paid to families pursuant to the Aid to Families with dependent Children ["AFDC"] program on the ground that the payments did not constitute overpayments because the state had not provided adequate notice that the state intended to terminate the payments. The court stated "[b]ecause the state did not terminate the recipients in accordance with federal notice requirements, the recipients' entitlement to aid was not affected. Consequently, *they did not receive an overpayment.*" *Id.* at 609 (emphasis added).

This court finds *Turner* is distinguishable from the case at bar because: (1) this court's finding that the notice requirements of § 3027(c) do not apply to adjustments made under § 3029(a); and (2) the *Turner* court found the state was trying to recover "AFDC" funds to which the families were actually entitled. In this case, there has been no finding that the state is actually entitled to the federal aid sought to be recovered; that determination is left to the district court on remand. In the case at bar, there has been no termination or purported termination of payments to the state. The plaintiff is merely seeking to recover funds which it claims were inappropriately spent.

points out, there is no such limitation in the language of § 3029(a) and the legislative history indicates no intent to place such a limitation on § 3029(a). Furthermore, as the Supreme Court stated when it addressed this argument in *Bell*, "[e]ven accepting that interpretation, we remain convinced that the provision covers payments misused as the [agency] determined these to have been. Grants of misused funds result from the 'accident' of the [agency's] reliance on assurances by the State that the recipient will use the funds in a program that complies with [title III], when in fact the recipient misuses the funds." *Bell*, 461 U.S. at 787, 103 S.Ct. at 2195-96.

This court concludes that the district court erred in deciding that the agency's only mechanism for enforcing the provisions of title III of the act are contained in 42 U.S.C. § 3027. The plain meaning of § 3029(a) gives the agency the right to recover, by adjustment for overpayments, title III funds allocated to and misused by the state.[6] Regarding the means by which the agency may recover such funds, the wording of the provision clearly shows that § 3029(a) authorizes only some form of set-off whereby any amount of funds misspent by a state would be subtracted from any future grants. Section 3029(a) provides that "[p]ayments of grants or contracts under this title [title III] may be made (*after necessary adjustments resulting from previously made overpayments or underpayments*) in advance or by way of reimbursement. . . ." 42

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[6] Because of this court's holding that the agency has statutory authority to recover misused title III funds from the state, the court will not discuss the agency's alternative argument that it has a common law right to recover misused funds.

U.S.C. § 3029(a) (emphasis added). This language clearly authorizes the agency to subtract funds misspent in the past from future grants.

Because of its holding that the agency's remedies were limited to those in § 3027, the district court in this case did not address the issue of whether the agency was correct in its decision that the funds at issue in this case were misused and, therefore, subject to disallowance. Also, the parties preserved their respective rights to litigate the issue of whether the funds were misused and correctly disallowed in the event that the case was appealed and remanded to the district court for further consideration. RE 36, 37. Therefore, this court does not reach this issue.

Accordingly, the judgment of the district court is REVERSED, and this case is REMANDED to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8914

District Court No. 1:88-cv-364

JAMES G. LEDBETTER, Ph.D., in his official capacity as Commissioner of the Georgia Department of Human Resources,

Plaintiff-Appellee,

versus

DONNA SHALALA, Secretary of the Department of Health and Human Services; CAROL FRASER FISK, Commissioner of Administration on Aging and FRANK NICHOLSON, Region IV Program Director of Administration on Aging, Departmental Grant Appeals Board,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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Before KRAVITCH, Circuit Judge, CLARK, Senior Circuit Judge, and PITTMAN*, Senior District Judge.

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* Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

JUDGMENT

(Filed March 17, 1993)

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: March 17, 1993
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabe
Deputy Clerk

ISSUED AS MANDATE: JUN 01 1993

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91-8914

JAMES G. LEDBETTER, et al.,

Plaintiff-Appellee,

versus

DONNA SHALALA, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Filed June 3, 1993)

Before: KRAVITCH, Circuit Judge, CLARK, Senior Circuit Judge, and PITTMAN*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

* Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources,	:	CIVIL ACTION NO. 1:88-cv-0364-HTW
Plaintiff,	:	
v.	:	
LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services (Substituted for OTIS R. BOWEN, resigned), et al.	:	
Defendants.	:	

JUDGMENT

(Filed Aug. 13, 1991)

This Older Americans Act, 42 U.S.C.A. Section 3001 et seq. case having come before the court on plaintiff's motion for summary judgment filed on April 18, 1989, and plaintiff's cross motion for summary judgment filed on May 30, 1989, and the court having granted plaintiff's motions, it is

Ordered and Adjudged that final judgment be, and the same hereby is entered in favor of plaintiff, JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources and it is

Further Ordered and Adjudged that the parties have preserved their respective rights to litigate the merits of

the underlying disallowance at issue in this case if defendants elect to appeal the Judgment entered against them and such appeal results in this matter being remanded to the United States District Court for further consideration.

Dated at Atlanta, Georgia, this 13th day of August, 1991.

LUTHER D. THOMAS, CLERK

By: /s/ Barbara D. Hatcher
BARBARA D. HATCHER
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources, Petitioner, v. LOUIS W. SULLIVAN, M.D. Secretary of Department of Health and Human Services (Substituted for OTIS R. BOWEN, resigned), *et al.*, Respondents.	CIVIL ACTION NO. 1:88-cv-364-HTW

ORDER

(Filed Aug. 13, 1991)

The Court having resolved the subject cause of action by its Order entered on July 10, 1991,

IT IS HEREBY ORDERED that Judgment be entered in favor of petitioner James G. Ledbetter and

IT IS FURTHER ORDERED that the parties have preserved their respective rights to litigate the merits of the underlying disallowance at issue in this case if respondents elect to appeal the Judgment entered against them and such appeal results in this matter being remanded to the District Court for further consideration.

SO ORDERED this 13th day of August, 1991.

/s/ Horace T. Ward
HORACE T. WARD
UNITED STATES
DISTRICT JUDGE

Presented by:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources,	:	CIVIL ACTION NO:
Petitioner,	:	1:88-CV-364-HTW
vs.	:	
OTIS R. BOWEN, Secretary of the Department of Health and Human Services; CAROL FRASER FISK, Commissioner of Administration on Aging; and FRANK NICHOLSON, Region IV Program Director of Administration on Aging, Departmental Grant Appeals Board,	:	
Respondents.	:	

ORDER OF COURT

(Filed July 9, 1991)

This petition for judicial review challenges a determination by the United States Department of Health and Human Services that $1,132,818 were [sic] improperly disbursed under the terms of the Older Americans Act of 1965. The case is pending on cross-motions for summary judgment.

PROGRAM BACKGROUND

A. The Older Americans Act

In 1965, Congress enacted the Older Americans Act ("OAA"). 42 U.S.C.A. § 3001 *et seq*. Under the OAA, the federal government provides assistance to states for the development and administration of a comprehensive system of services for the elderly.[1] The Administration on Aging ("AOA"), which is part of the United States Department of Health and Human Services ("HHS"), is the principal federal agency designated by Congress to carry out the provisions of the OAA.[2]

The OAA provides for an extensive system of services for all older Americans, including but not limited to: programs to improve employment opportunities for older individuals, nutritional services, an ombudsman program to assist older persons with problems in long-term care facilities as well as during the receipt of in-home care, provision of senior citizens' centers, transportation programs, and legal assistance.

Title III of the OAA provides for state and community programs on aging. Under Title III the AOA allocates grant funds on the basis of a statutory formula.[3] Such allocations are disbursed among participating state and territorial units which submit plans approved by the Commissioner of the Administration on Aging.[4]

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[1] *See*, 42 U.S.C.A. §§ 3001, 3003; 45 C.F.R. tit. XIII, subch. C.

[2] 42 U.S.C.A. § 3011.

[3] 42 U.S.C.A. § 3024.

[4] 42 U.S.C.A. § 3025(a)(1).

B. The Georgia Office of Aging

The State of Georgia has designated the Georgia Department of Human Resources ("DHR") as the exclusive state agency for the administration of the aging program in Georgia. Within the DHR, the Georgia Office of Aging ("GOA") is the organization responsible for the implementation and execution of Title III programs for the state. The GOA is granted considerable flexibility regarding the manner in which it implements the Title III programs as long as the requirements of the OAA and pertinent regulations are satisfied.

Within its discretion, the DHR has established eighteen (18) separate planning and service areas for OAA programs within the state. For each area, the GOA has designated an Area Agency on Aging to administer and support numerous community-based activities. Among the responsibilities imposed upon each Area Agency is an obligation to develop an area plan in accordance with pertinent federal and GOA guidelines.

The GOA is responsible for the review and approval of plans submitted by each Area Agency. The GOA has the authority to approve area plans, in whole or in part, to disapprove plans, and to negotiate any necessary changes in plans. Performance of such functions by the GOA is to assure that costs and activities for which federal and state funds are being obligated comport with cost principles for grant administration as set forth in Title III of the OAA and pertinent regulations. The GOA is also primarily responsible for monitoring compliance with federal requirements once an area plan is approved and payments are made.

The GOA has designated the Atlanta Regional Commission ("ARC") as the Area Agency on Aging for the seven county Metropolitan Atlanta area. Area plans were submitted by the ARC for fiscal years commencing July 1, 1982, July 1, 1983, and July 1, 1984, respectively. The area plans were reviewed and ultimately approved by the GOA. The ARC received allocations of Title III grant funds to implement administration of its area plan for these fiscal years.

In order to implement its area plan, the ARC was governed by guidelines set forth in the plan. The guidelines specified that the ARC would be responsible for periodic monitoring, assessment, and evaluations of activities performed under its plan. Five specific areas of responsibilities were established for the ARC: (1) administrative support; (2) program planning; (3) program maintenance; (4) program coordination; and (5) program development. Following its plan, the ARC contracted with other organizations to provide nutrition and support services to citizens intended to benefit under the OAA.

Insofar as expenditures for administrative services are concerned, the ARC was governed by two principal statutory requirements. First, no more than eight and one-half percent (8.5%) of the state allotment could be utilized to cover administrative costs for a plan.[5] Second, federal funds could not be used to pay more than seventy-five percent (75%) of the total of expenditures made to cover such administrative costs.[6] Thus, at least twenty-

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[5] 42 U.S.C.A. § 3024(d)(1)(A).

[6] 42 U.S.C.A. § 3024(d)(1)(A); 45 C.F.R. § 1321.199 (1984).

five percent (25%) of the total cost of expenditures for administrative expenses was to be paid from non-federal sources. The non-federal contributions could be in cash or "in kind" contributions.[7] If such non-federal payment consisted of "in-kind" rather than cash contributions, such non-cash, non-federal contributions must satisfy guidelines which establish when an "in-kind" contribution was allowable.[8]

Under the OAA, a Title III program covers many functions. Insofar as the plan at issue in this matter is concerned, six separate functions were involved: (1) state plan administration; (2) area plan administration; (3) the ombudsman program; (4) supportive services; (5) congregate meal services; and (6) home meal services. Although 25% of the cost of state and area plan administrative costs had to be satisfied from non-federal sources, only fifteen percent (15%) of the costs of providing actual services need be satisfied from non-federal sources.[9]

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[7] 42 U.S.C.A. § 3024(d)(2).

[8] In kind contributions are permitted for the purpose of satisfying a prerequisite to necessary federal matching funds only if such contributions would be "allowable costs." 45 C.F.R. § 74.53(e). "Allowable costs" are addressed in Office of Management and Budget Circular A-87, the terms of which are incorporated in regulations governing "allowable costs" of activities conducted by state governments and which states that "allowable cost" must be allocable to a particular cost objective and "[b]e necessary and reasonable for efficient administration of the grant programs." 45 C.F.R. § 74.171. *See*, 45 C.F.R. §§ 64.53(e), 1321.201; Office of Management and Budget Circular A-87, C.1 and C.2.

[9] 42 U.S.C.A. § 3024(d)(1)(D).

HHS states that, in satisfaction of meeting the duty to provide a minimum level of non-federal funding, funds may be exchanged among or between program functions which have comparable benefits *and* the same minimum level of non-federal funding, or match. Thus, an excess of non-federal funding in a *service* area may not be transferred to cover shortage of non-federal funding in an *administrative* area, or vice versa.

HISTORICAL BACKGROUND TO THIS DISPUTE

Commencing in early 1985, the AOA regional staff initiated an administrative review of the agencies for each of the eight states and 109 Area Agencies within Region IV. After having identified potential problems in funding allocations, a detailed review was commenced at the state level and completed by the HHS Office of Inspector General in August 1984.

The review began with a [sic] evaluation of areas [sic] plans on file with the respective State Offices of Aging. Based on the preliminary findings of the administrative review of plans on file with the GAO [sic], federal reviewers conducted an on-site review of the ARC operations from July 15-19, 1985. The review was intended to scrutinize the expenditure of Title III funds, focusing upon expenditures for the three fiscal years running from July 1, 1982 through June 30, 1985.

A) The Disallowance At Issue in this Case

1) ARC Acceptance of Improper Non-Federal Contributions for Administrative Costs.

One point which attracted the concern of federal examiners was the acceptance by ARC of certain "in-kind" contributions for fiscal years 1983/84 and 1984/85. As mentioned above, the use of "in-kind" contributions to meet the required level of non-federal funding must meet pertinent acceptability requirements. In the case of ARC, the HHS investigation found that "in-kind" contributions in the form of donated space were accepted from two independent service providers who were under contract with ARC to provide nutrition and supportive services directly to the elderly. Such donated space from the independent service providers was used solely for the provision of services by these independent contractors. The space was not used by the ARC to carry out its administrative functions, nor was the space used by the service providers to carry out administrative functions under a delegation of authority from the ARC. Nevertheless, the ARC used the value of the donated space to satisfy a portion of the 25% non-federal match requirement for administration of an area plan established under 42 U.S.C.A. § 3024(d)(1)(A) and 45 C.F.R. § 1321.199(b).

HHS determined that such "in-kind" contributions was [sic] not permitted under the regulations. HHS determined that the functions, responsibilities, and cost objectives of the ARC are distinct from the functions, responsibilities, and cost objectives of the service providers. HHS further determined that donated space used solely by independent contractors for the direct provision

of services to the elderly provided no benefit to area plan administration by the ARC, could not be allocated to an administrative function, and did not meet the requirements for a non-federal, "in-kind" contribution.

The amount of improper "in-kind" contributions was calculated by federal examiners. They found that the amount of "in-kind" contributions ARC attempted to credit was $139,196. However, an excess non-federal contribution of $4,377 was reported for Georgia administrative costs during the applicable period. Thus, HHS determined that the total shortfall in non-federal contributions for administrative costs was $134,819. Under the law, federal funds are allocated at a rate of three federal dollars for each state dollar. Because, HHS disallowed $134,819 in non-federal contributions, three times that amount, or $404,857, was the amount in federal funding participation was [sic] disallowed for administrative costs.

2) ARC Utilization of Funds for Costs of Nutrition Administration

A second area of concern was identified by federal auditors in the area of payments for "nutrition administration." During the three year period covered by the review, it was discovered that the ARC had used Title III-C funds to pay for "nutrition administration." HHS determined that ARC practices were unacceptable.

The conclusion rested upon ARC not being a service provider, which is an entity responsible for the direct, daily provision of a service. Because ARC is not and had not been a service provider, two options were available to

ARC by which costs could be allocable to it. One option was to allocate an expenditure as a cost of area administration, in accordance with the provisions of 42 U.S.C.A. §§ 3023(c)(1) and 3024(d)(1). A second option was to allocate an expenditure as a program development and coordination cost pursuant to 45 C.F.R. § 1321.25(h)(1). HHS determined that neither option was viable in this case. ARC had already obligated funds to the 8.5% ceiling for administrative costs established under 42 U.S.C.A. § 3024(d)(1). Because the expenditures at issue were found not to be "program development and coordination costs," such costs were not attributed and could not be reclassified as such. Instead, HHS found that such expenditures were administrative costs in excess of the 8.5% ceiling placed upon such costs. Consequently, total "nutrition administration" costs of $728,361 were disallowed by the auditors.

B) Administrative Disposition of this Case

Petitioner was notified of the results of the audit by letter received August 18, 1986 from Carol Fisk, the Acting Commissioner on Aging. Commissioner Fisk recounted therein the legal basis and methodology in computing the disallowances recounted above. The State of Georgia was advised to repay $1,132,818 in disallowed costs. By follow-up letter received September 12, 1986, the state was advised that the disallowance letter was a final decision by HHS, which could be appealed to the

Department [sic] Grant Appeals Board, in accordance with 45 C.F.R. Part 16.[10]

In response, petitioner filed an appeal with the Departmental Grant Appeals Board. DHR alleged a pattern of conduct by HHS officials which DHR believed to have estopped the federal government from attempting to recoup the amount of the allowance. DHR also argued that HHS had misinterpreted applicable statutory and regulatory provisions.

On May 21, 1987, the HHS Departmental Grant Appeals Board affirmed the Disallowance in full. The Board rejected the DHR's claim that HHS was estopped from recouping the amount of the disallowance, noting that the state "seriously misstated the current law of estoppel with respect to the federal government." The Board also held that the efforts by DHR to improperly credit "in-kind" contributions and charge administrative costs above the 8.5% ceiling on such costs had been properly disallowed. The Board reaffirmed the disallowance on June 25, 1987.

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[10] 45 C.F.R. Part 16, including § 16.91, applies to the disallowances under consideration here. That section provides:

> . . . [T]he Board shall have jurisdiction over any disallowance described in § 16.90. That disallowance may not be reviewed by the Board unless the head of the constituent agency or someone he has designated in writing for that purpose has notified the grantee in writing of such disallowance. The notification shall set forth the reasons for the disallowance in sufficient detail to enable the grantee to respond and shall inform the grantee of this opportunity for review under this part.

45 C.F.R. § 16.91 (1990).

The Commissioner of DHR then filed this action for judicial review. Complete and supplemental briefing on the issues were [sic] submitted.

STANDARD OF REVIEW

Before addressing the merits, this Court must determine the proper standard of review for evaluating the Grant Appeals Board decision. Generally, review of federal agency action is governed by the standard of review established under the Federal Administrative Procedure Act (hereinafter "APA"). *See,* 5 U.S.C.A. § 706.

The APA provides for four types of review: *de novo,*[11] clearly erroneous, substantial evidence, and review to ensure that decisions are neither arbitrary nor capricious. Under the arbitrary and capricious standard, a court may only set aside findings and conclusions deemed to be:

> arbitrary, capricious, and an abuse of discretion or otherwise not in accordance with the law or unsupported by substantial evidence in the record as a whole.

5 U.S.C.A. § 706(2)(A) (1990); *see also, Memorial Hospital v. Heckler,* 706 F.2d 1130, 1135 (11th Cir. 1983), *cert. denied,*

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[11] *De novo* review is reserved for those situations when an administrative action is adjudicatory in nature and the agency fact finding procedures are inadequate or when issues not before the agency are raised in a proceeding to enforce non-adjudicatory agency action. *See, Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415 (1971). *De novo* review rarely applies and does not here.

465 U.S. 1023 (1984). An "arbitrary and capricious" finding is one where the agency has made a clear error of judgment.

When reviewing under the arbitrary and capricious standard, this court sits neither as a fact finder nor as a judge of the weight of the evidence. An agency is entitled to deference in interpreting the statutory and regulatory provisions which it is charged to administer. *See, Connecticut Department of Income Maintenance v. Heckler,* 471 U.S. 524 (1985); *Udall v. Tallman,* 380 U.S. 1 (1965); *Charter Peachford Hosp., Inc. v. Bowen,* 803 F.2d 1541, 1544 (11th Cir. 1986); *Carraway Methodist Medical Center v. Heckler,* 753 F.2d 1006, 1009 (11th Cir. 1985).

Where a claim is made that agency action is in excess of statutory jurisdiction, ability or limitations, or short of statutory right, a court must necessarily make a first-hand comparison of the claimed excessive action with pertinent statutory authority. *Western Union Telegraph Company v. FCC,* 541 F.2d 346, 354 (3rd Cir. 1976), *cert. denied,* 429 U.S. 1092 (1977), *citing FPC v. Moss,* 424 U.S. 494 (1976). A federal agency has no power to act unless and until Congress confers power upon it. *Louisiana Public Service Comm. v. FCC,* 476 U.S. 355, 374 (1986); *Lyng v. Payne,* 476 U.S. 926, 937 (1986).

In conducting a review of whether a particular statutory scheme authorizes a questioned administrative action, the court must undertake a two-step analysis. This is known as the principle of "clear statement." *See generally, Lugo v. Schweiker,* 776 F.2d 1143, 1147 (3rd Cir. 1985). First, the court determines whether the statute itself answers the question at issue. If the statute speaks to the

issue, then the court must simply make sure that the agency has given effect to the expressed intent of Congress. *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987). If there is no explicit provision within the statute addressing the issue, the court must then inquire as to whether the agency interpretation constitutes a permissible construction of the statute by the agency. *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

This "clear statement" analysis affects the standard of review. If Congress has spoken clearly on the meaning of the statute, that ends the inquiry; no agency interpretation is needed. However, if the statute is vague or silent, the Court must then decide whether Congress explicitly or implicitly delegated to an agency the power to augment a statute through regulation and action. If the delegation is explicit, an arbitrary and capricious standard applies. If, however, the delegation is implicit, a reasonableness standard governs.

The primary responsibility for demonstrating a statutory basis for agency jurisdiction lies with the agency itself. *Trailer Marine Transport, Corp. v. Federal Maritime Comm.*, 602 F.2d 379, 395 n. 69 (D.C. Cir. 1979).

SUMMARY JUDGMENT

The standards for the grant or denial of summary judgment are clearly set forth in the Supreme Court's trilogy of 1986 decisions that clarified the proper analytical framework. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S.

317 (1986). In those cases, the Supreme Court explained that the standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. "[T]he requirement is that there be no genuine issue of material fact." *Id.*, at 248.

In this case, the parties dispute the agency's handling of the evidence, some procedural issues and the agency's interpretation of the OAA. Summary judgment is a proper vehicle for each of these disputes. The court's determination on whether the agency properly interpreted the OAA is dispositive of this case and precludes the necessity of addressing the merits of petitioner's other contentions.

DISCUSSION

Petitioner moves for summary judgment on the grounds that the AOA lacked statutory authority to disallow $1,132,818.00 in federal funding to the Georgia Office of Aging to be used for the support of Georgia's elderly. Petitioner contends that the absence of statutory authority for the agency's action supports a reversal of the disallowance decision. Since the Administration on Aging has no power to create a rule or regulation out of harmony with its statutory grant of authority, the court must first focus on the provisions of the Older Americans Act.

Petitioner contends that the Commissioner is limited to a non-compliance sanction, that no provision is made for a disallowance and that the Commissioner disallowed

funds without any statutory authority for making a disallowance. As a result, HHS acted outside the scope of its statutory authority. Petitioner argues that this court should hold unlawful and set aside the agency action as being in excess of its statutory authority. *citing* 5 U.S.C.A. § 706(2)(c); *National Assoc. of Reg. Util. Com'rs. v. FCC*, 533 F.2d 601 (D.C.Cir 1977); *Real v. Simon*, 510 F.2d 557, 564 (5th Cir. 1975).

A noncompliance decision addresses the entire state OAA plan. This procedure is different from a disallowance which normally refers to any "item or class of items" within the plan. 42 U.S.C.A. § 1316(d). This circuit has determined that this court has authority to review disallowance rather than plan-nonconformity orders under section 1316(a)(3). *Georgia Department of Medical Assistance v. United States Department of Health and Human Services*, 708 F.2d 627, 628 (11th Cir. 1983). It appears that the parties consider the decision of the agency to be a disallowance decision because it addresses a couple of items under Georgia's plan rather than the entire plan.

In this case, an examination of Chapter 35, 42 U.S.C.A. § 3000 *et seq.*[12] discloses no provision authorizing HHS to "disallow" federal financial participation in

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[12] The Act has been rarely addressed in the caselaw. *See e.g., Community and Economic Development Association of Cook County, Inc. v. Suburban Cook County Area Agency on Aging and South Suburban Council on Aging*, 770 F.2d 662 (7th Cir. 1985); *Commission on Aging of the State of Alabama v. Finch*, 430 F.2d 667 (5th Cir. 1970); *Meek v. Martinez*, 724 F. Supp. 888 (S.D.Fla. 1987); *North Carolina v. Heckler*, 584 F. Supp. 179 (E.D.N.C. 1984); *Kennedy v. Mathews*, 413 F. Supp. 1240 (D.C.D.C. 1976); *Dorak v. Shapp*, 403 F. Supp. 863 (M.D.Pa. 1975).

the OAA.[13] The statutory authority upon which HHS ordinarily relies for its disallowance decisions is 42 U.S.C.A. § 1316(d).[14] However, § 1316 addresses other HHS programs and does not explicitly include programs under the OAA.

The enforcement mechanism made available to the Commissioner of the Administration on Aging by Congress is contained in 42 U.S.C.A. § 3027(b),(c) and (d). Collectively, those sections provide that whenever the Commissioner determines that a state is not eligible for federal financial participation, the Commissioner shall

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[13] In numerous cases dealing with the district court's jurisdiction under 42 U.S.C.A. § 1316, the outcome hinges on the characterization of the dispute as a noncompliance or a disallowance. *See, e.g., Illinois Department of Public Aid v. Schweiker,* 707 F.2d 273, 278 (7th Cir. 1983) (Secretary's treatment of dispute as disallowance or nonconformance adopted by court); *Massachusetts v. Departmental Grant Appeals Bd of HHS,* 698 F.2d 22, 27-30 (1st Cir. 1983) (three point functional test); *New Jersey v. Department of Health and Human Services,* 670 F.2d 1262, 1277 (3rd Cir. 1981); *New Jersey v. Department of Health and Human Services,* 670 F.2d 1284, 1290-92 (3rd Cir.), *cert. denied,* 459 U.S. 824 (1982); *New Jersey v. Department of Health and Human Services,* 670 F.2d 1300 (3rd Cir. 1982) (functional test devised to ascertain whether administrative holding is a noncompliance or a disallowance); *Virginia ex rel. Virginia Dept. of Medical Assistance Services v. Bowen,* 680 F. Supp. 228 (W.D.Va. 1988) (district court has jurisdiction to review disallowance, not compliance, decisions).

[14] If a state is dissatisfied with a disallowance decision, "the State shall be entitled to and upon request shall receive a reconsideration of the disallowance." § 1316(d). The statute is silent as to the forum in which such reconsideration may be had. 42 U.S.C.A. § 1316(d) has been recognized by the Supreme Court as adequate authority for a disallowance. *Bowen v. Massachusetts,* 487 U.S. (1988).

notify the state agency that no further payments from its allotments under § 3024 and § 3028 will be made until the Commissioner is satisfied that there will no longer be any failure to comply. *See, e.g., Commissioner on Aging of State of Alabama v. Finch,* 430 F.2d 667 (5th Cir. 1970). This type of enforcement mechanism is characterized as a "plain [sic] conformity" remedy and provides for a non-compliance sanction.

Thus, the court concludes that Congress has made no provision in the Older Americans Act for the Commissioner to utilize the disallowance procedure to address a state's failure to comply with statutory and regulatory provisions governing the OAA. The only mechanism explicitly provided is the plain [sic] conformity remedy and the only sanction is the non-compliance sanction.

This conclusion requires the second phase of analysis in determining whether the statutory scheme of the Older Americans Act authorizes the disallowance sanction issued by the Commissioner in this case.

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Lugo v. Schweiker, 776 F.2d at 1147, quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Respondents contend that the agency made a reasonable interpretation of its governing statute in determining that it had the authority to disallow funds. In support, respondents contend that Congress provided authority to the Commissioner to audit a state's compliance with program requirements, 42 U.S.C.A. § 3030(a), and allows grants to be adjusted to recoup overpayments from previous years, 42 U.S.C.A. § 3029.

Petitioner responds that a review of OAA's statutory scheme indicates that Congress has provided a comprehensive procedure for HHS to ensure compliance with the OAA. Petitioner contend [sic] that, under the applicable statutory provisions, HHS is only permitted to withhold funds from any state which fails to substantially comply with any provision which it is required to implement pursuant to its approved state plans. 42 U.S.C.A. § 3027(d)(3).

Petitioner also contends that congressional intent on this issue is shown by the fact that Congress has provided for the use of funds withheld in such manner. Under 42 U.S.C.A. § 3024(c), HHS may disburse any withheld funds to any public or private non-profit institution or organization, agency, or political subdivision submitting an approved plan. Moreover, under 42 U.S.C.A. § 3027(d), HHS need not eliminate payments to the entire program, but in its discretion may withhold funds only to those projects under the state plan which are affected by the failure to comply. Thus, petitioner argues that, in the

OAA's non-compliance procedure, HHS is authorized by Congress to withhold funds from a specific area of the program without penalizing the elderly in a state as a whole.

Whenever funds are so withheld, Congress has provided for an appeal procedure, HHS has promulgated regulations pursuant to that procedure and such regulations immediately follow the regulations governing HHS audit authority. *See* 45 C.F.R. § 1321.213 *et seq.*; 42 U.S.C.A. § 3027(e); 45 C.F.R. § 1321.231 *et seq.*

After reviewing the provisions of the OAA, the Court finds that Congress has not addressed whether a disallowance is a permissible sanction under the OAA. However, the intent of Congress is not completely obscure. In considering the absence of a disallowance sanction in the OAA, the court is guided by the rule of statutory construction which states "that the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius.*" 73 Am.Jur.2d, Statutes, § 211, at 405. *See, e.g., Trans-america Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19-24 (1979); *Associates Commercial Corp. v. Sel-O-Rak Corp.,* 746 F.2d 1441, 1444 (11th Cir.1984); *Belluso v. Turner Communications Corp.,* 633 F.2d 393, 397 (5th Cir.1980); *United States v. Capeletti Bros., Inc.,* 621 F.2d 1309, 1315 (5th Cir.1980).

The court acknowledges that this principle has its limits and exceptions and cannot apply when the legislative history and context are contrary to such a reading of

the statute.[15] *See, e.g., Herman & MacLean v. Huddleston,* 459 U.S. 375, 387 n. 23 (1983) (rejecting application of *expressio unius* principle an [sic] holding that availability of express remedy under one section of Securities Act of 1933 did not preclude maintenance of action under another section of act, in light of purposes of act); *Illinois, Dep't of Public Aid v. Schweiker,* 707 F.2d 273, 277 (7th Cir.1983) ("Not every silence is pregnant;" holding that agency decision of disallowance was subject to judicial review in district court although Congress said nothing about judicial review in statute section relating to disallowances, while specifically providing for review in appellate court in another section relating to agency determinations of plan nonconformity).

However, after reviewing the briefs, materials, and conducting its own review of the applicable law and legislative history, the court finds petitioner's contentions persuasive. Congress considered appropriate sanctions for a state's failure to comply with the requirements of the OAA which would also be consistent with its purposes. It appears that Congress was aware of the difference between the disallowance and noncompliance sanctions.

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[15] The court is acutely aware of the limitations of the *expressio unius* rule of interpretation.

> The maxim . . . is not of universal, but of limited, use and application. It is an aid to construction, not a rule of law. It is not conclusive, is applicable only under certain conditions, is subject to exceptions, may not be used to create an ambiguity, and requires great caution in its application.

73 Am. Jur.2d, Statutes, § 212, at 405-06.

The court concludes that Congress selected the non-compliance sanction, chose distinctive procedures for withholding funds from any agency or political subdivision whose actions fail to comply with an approved plan, and chose not to include the disallowance procedure used by the HHS in other federal programs. In selecting the non-compliance sanction and excluding the disallowance sanction, Congress implicitly stated its preferred approach to dealing with a state with programs which may fail to meet the statutory and regulatory requirements of the OAA.

CONCLUSION

In sum, the court determines that the Acting Commissioner on Aging made a [sic] unreasonable interpretation of the OAA in determining that it had the authority to disallow funds. Although HHS may utilize the disallowance sanction in addressing other federal programs, the Commissioner exceeded her statutory authority under the OAA.

Accordingly, petitioner's motion for summary judgment is **GRANTED.** Respondents' motion for summary judgment is **DENIED.** The parties are **ORDERED** to submit, within ten (10) days of receipt of this order, a consolidated status report on the impact of this decision on the overall case and a proposed approach towards resolving any outstanding matters.

SO ORDERED, this 9th day of July, 1991.

/s/ Horace T. Ward
HORACE T. WARD
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES G. LEDBETTER, in his official capacity as Commissioner of the Georgia Department of Human Resources, Plaintiff	:	
vs.	:	
OTIS R. BOWEN, Secretary of the Department of Health and Human Services; CAROL FRASER FISK, Commissioner of Administration on Aging; and FRANK NICHOLSON, Region IV Program Director of Administration on Aging, Departmental Grant Appeals Board, Defendants	:	1:88-CV-364-HTW

ORDER OF COURT

(Filed Sept. 27, 1988)

This matter is pending before the court on plaintiff's request for entry of default, motion for default judgment, motion for hearing and motion to strike. The motion to dismiss which was previously filed by the defendants has been withdrawn.

Request for Entry of Default

Service against the defendants was perfected on March 14, 1988. The complaint was served upon the United States Attorney on February 29 and upon officials of the agency involved on March 1, 1988. Service was made upon the Attorney General on March 14. One acknowledgement that the Summons and Complaint had been received was dated March 7 and filed on March 23; another acknowledgement was dated March 14 and filed on March 23; a third was apparently signed on March 28 and sent to plaintiff's counsel. Plaintiff requested entry of a default on May 18, 1988. Defendants filed a response on May 20 which argued that their counsel had understood that an answer would not be due until sixty days after his March 28 execution of the acknowledge [sic] of receipt of summons and complaint. The defendants filed their motion to dismiss on May 26 and they withdrew their motion and filed their answer on July 27. Plaintiff then moved to strike the answer on the ground that the defendants are in default.

Service of the complaint upon the United States Attorney was accomplished by February 29, 1988, and service against all defendants was perfected by March 14, 1988. *See* Fed.R.Civ.P. 4(d)(4) & (5). The defendants' answer was thus due no later than May 14, 1988. *See* Fed.R.Civ.P. 12(a). The filing of a motion to dismiss tolls the time limits for answers, *see Id.*, but the defendants' motion to dismiss was not filed until May 26, almost a month after the answer was due. Under Federal Rule of Civil Procedure 55(a), entry of a default is automatic

when a party fails to comply with the pleading requirements of Rule 12. Plaintiff's motion for entry of a default is accordingly GRANTED.

Motion for Default Judgment and Motion to Strike

Federal Rule of Civil Procedure 55 also provides that, "[f]or good cause shown the court may set aside an entry of default." Fed.R.Civ.P. 55(c). "Determination of whether good cause exists depends upon the Court's applying its discretion with proper regard to the peculiar circumstances surrounding the case before it. . . . Judgments by default are not generally favored; hence, as a general proposition, any doubts should be resolved in favor of permitting a hearing on the merits." *Rasmussen v. W.E. Hutton & Co.*, 68 F.R.D. 231, 233 (N.D.Ga. 1975). "Factors considered in determining whether a default should be set aside include: whether the defaulting party has presented a plausible excuse explaining the reasons for the default, whether the defaulting party acted promptly to vacate the default, whether the defaulting party asserts a meritorious defense, and whether the non-defaulting party will be prejudiced by setting aside the default." *Turner Broadcasting System, Inc. v. Sanyo Elec., Inc.*, 33 B.R. 996, 1001 (N.D.Ga. 1983), *aff'd*, 742 F.2d 1465 (11th Cir. 1984); *see Rasmussen*, 68 F.R.D. at 233; 6 J.W. Moore, W.J. Taggart, & J.C. Wicker, *Moore's Federal Practice* ¶55.10[2] (1988).

In light of the maxim that judgments by default are disfavored, the court finds it appropriate to construe defendants' response to plaintiff's motion for entry of default and defendants' response to plaintiff's motion for

default judgment in the nature of a motion to set aside default. Plaintiff's motion to strike answer is accordingly DENIED.

Defendants' counsel argues that he believed the answer was not due until the end of May, sixty days after his execution of the acknowledgement of service. He argues this impression was fostered by a conversation he had with plaintiff's counsel. Plaintiff's counsel denies he ever indicated to defendants' counsel that the answer was not due until late May. It appears to the court, however, that the excuse offered by the defendants' counsel is a plausible one and that defendants' counsel acted promptly to rectify the default. It also appears that plaintiff will not be prejudiced by setting aside the default, as plaintiff had notice well before a responsive pleading was filed that defendants would oppose this action and upon what basis they would oppose this action. In addition, the allegations made in defendants' answer indicate that defendants assert a meritorious defense, as well as the fact that the extensive administrative appeals in this matter were decided adversely to the plaintiff. Plaintiff's motion for a default judgment is therefore DENIED; defendants' response to the motion, construed as a motion to set aside default, is GRANTED.

CONCLUSION

It is hereby ORDERED that plaintiff's motion for entry of default is GRANTED. Plaintiff's motion to strike is DENIED. Plaintiff's motion for a default judgment is DENIED. Plaintiff's motion for a hearing is DENIED. The

court notes that defendants' motion to dismiss has been withdrawn.

SO ORDERED, this 27th day of Sept, 1988.

/s/ Horace T. Ward
HORACE T. WARD

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Georgia Department of Human Resources DATE: June 25, 1987
Request for Reconsideration of Board Decision No. 870

RULING ON REQUEST FOR RECONSIDERATION

The Board's regulations provide at 45 CFR 16.13 that the Board has authority to reconsider its own decision where a party "promptly alleges a clear error of fact or law." By letter dated June 11, 1987, the Georgia Department of Human Resources (State) requested that the Board reconsider its decision in Georgia Department of Human Resources, Decision No. 870, May 22, 1987.[1]

The Decision

In the *Georgia* proceeding, the Board had asked the State to answer questions concerning the use of space, allegedly donated by service providers, that was claimed as in-kind match to satisfy the non-federal share requirement for administrative costs of an area agency on aging. Since no timely answer had been received, and the Board was unable to elicit a response from the State as to when an answer might be forthcoming, the Board inferred that the Agency's characterization of the space as being used

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[1] On June 15, 1987, the Atlanta Regional Commission, the area agency whose administrative costs were disallowed in Decision No. 870, filed an Application to Intervene and Motion for Reconsideration for this proceeding. We have denied that request in a separate Board ruling issued with this one.

for the direct provision of services, which had not been specifically challenged by the State, was correct. Consequently, the Board upheld the part of the disallowance concerning the in-kind contributions claimed as administrative expenditures. See Decision at p. 9. The Board also considered and rejected the State's argument concerning costs which it had claimed as "nutrition administration" costs, finding that they were subject to the statutory 8.5% cap on administrative costs. Decision at p. 7. Finally, the Board reviewed the State's arguments that the Agency should be estopped from taking this disallowance and found them to be without merit. Decision at pp. 9-14.

The State's Motion

The State's motion principally attacked the Board's conclusion concerning the in-kind contributions by service providers. In its motion, the State alleged at page 1, that it was a –

> clear error both of fact and law to infer, based on counsel's failure to respond to a Board question, that "the Agency's characterization of the donated space [as used solely by independent contractors for the direct provision of services to beneficiaries] is correct." Decision at 9.

The State acknowledged that counsel was delinquent in failing to respond to the Board's question; it attempted to excuse this conduct by offering details of the professional and personal responsibilities of the particular attorney assigned to the case. The State also claimed that it did not know that the deadline for responding was April 7, 1987. In its submission, the State urged the Board to consider evidence that it included with the submission to allegedly

demonstrate that the inference drawn by the Board was erroneous in fact. In addition to its arguments on the in-kind contribution issue, the State reiterated its arguments on the other issues decided in Decision No. 870, and made an "alternative request" to the Board to reopen the case and permit the State to present all evidence relating to the issue of equitable estoppel. Motion at 6.

Analysis

A brief review of the procedural history of this case is necessary to put the State's motion in context. The State filed its notice of appeal, along with a request for discovery, on September 17, 1986. In an acknowledgment letter dated September 22, 1986, the Board instructed the State to pursue its discovery requests directly with the Agency and to contact the Board within 30 days after receiving the acknowledgment to inform it whether a discovery order was still requested. The deadline for the State's submission was October 27, 1986; repeated efforts by the Board to elicit a response from the State were fruitless, and the Board issued an order to show cause why the case should not be dismissed. *See* December 15, 1986 Order to Show Cause. On January 2, 1987, the State's counsel filed a submission apologizing for not having requested an extension of time, although he had been instructed to do so, and asking that the appeal not be dismissed. On January 6, 1987, the Board, while noting that the State's explanation for the delay was not entirely satisfactory, granted the State's request and set a briefing schedule for the proceeding. The State filed its appeal brief and file on January 23, 1987, and the Agency filed its response brief on March 20, 1987. On March 26, 1987, the

Board telephoned the State to ask that it answer in its upcoming reply brief certain questions raised by the Agency's response; the request for information was confirmed in a letter dated March 30, 1987. As detailed in the Decision at footnote 5, the Board repeatedly tried to contact the State between April 15 and April 29 in order to find out when the State's submission was coming. Finally, in the May 22, 1987 Decision, the Board determined to draw a negative inference from the State's failure to respond to the questions, also noting that the State's failure to file a reply brief left the Agency's assertions on this issue unchallenged.[2]

Although the State made the *pro forma* statement that the Board committed a clear error of fact or law in drawing a negative inference from the State's silence, the State nowhere identified any particular error in the Board's conclusion that it was appropriate under the circumstances to make this negative inference. The State did not deny that the question was asked or that the Board made repeated efforts to inquire about whether an answer was forthcoming. Moreover, although the State explained that the particular attorney assigned the case, a Mr. David Will, was very busy, a second attorney, who signed both the notice of appeal and the State's appeal brief, was also

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[2] Even if the Board had not drawn the negative inference from the State's lack of response, the Board would not have reversed the disallowance based on the State's unsupported, and contested, allegation concerning the allocability of the donated space, particularly since the State was required, under 45 CFR 74.53(d), to maintain documentation on in-kind contributions. We note that, even at this stage, the State has offered only an affidavit in support of its position.

telephoned (*see* Memorandum of Telephone Call to Mr. William Joy, dated April 29, 1987), and failed to respond. In addition, at one point a secretary employed by the State told the Board that the answer was forthcoming. *See* Memorandum of Telephone Conversation with Helen Burroughs, dated May 1, 1987. The State did not claim that it could not have assigned another attorney; indeed, the attorney's supervisor alleged by affidavit that if he had known the deadline for responding to the Board's questions, it would have been met. Affidavit of William C. Joy at p. 2.

Furthermore, although the State claimed that it did not know that the deadline for answering the Board's questions was April 7, the letter asking the questions clearly stated that the answers were to be included in the State's reply brief.[3] Under Board regulations, that reply brief was due to be filed within 15 days of the State's receipt of the Agency's response. 45 CFR 16.8(c). The Board's acknowledgment letter referenced this regulation, and the Board's January 6, 1987 Ruling on Request for Extension also expressly stated that, following the receipt of the respondent's brief, "the appellant will have 15 days to submit a reply brief." January 6, 1987 letter at p. 1. The Board's decision, in which it concluded that a negative inference

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[3] The Board calculated the due date for the State' reply brief, April 7, 1987, by adding 15 days to the date upon which the Board received the respondent's brief, March 23, 1987. Actually, since the respondent's and State's counsel are both located in Atlanta, Georgia, it is likely that the State received the respondent's submission earlier than the Board did. The State has not alleged that it did not receive the respondent's brief in a timely fashion.

could be drawn from the State's failure to respond, was not issued until 60 days had passed following the Board's receipt of the respondent's brief, after the Board had made repeated efforts to elicit the requested information. Thus, we conclude that the Board's determination to draw the negative inference was not based on an error of fact.[4]

Likewise, the State has not indicated how the Board's determination was based upon an error of law. The State did not deny that the Board was entitled under its regulations to proceed to decision on the record before it. *See* 45 CFR 16.15(c). The State similarly did not allege that the sanction imposed for the State's failure to respond was inappropriate. Indeed, the Board could have reasonably summarily dismissed the appeal with prejudice for failure to meet a requirement established by the Board (*see* 45 CFR 16.15(b)), especially given the State's previous failure in the same proceeding to make a timely submission and to return telephone calls inquiring about it. As noted above, that prior lapse resulted in an Order to Show Cause why the appeal should not be dismissed, which warned the State of these possible consequences. Therefore, since the Board's determination to proceed without

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[4] The State offered evidence with its Motion – the affidavit discussed in footnote 2 – which it contended showed that the factual finding reached by the Board on the use of the donated space was incorrect. The State did not allege, however, that this evidence was newly discovered or could not, for some other reason, have been provided in a timely fashion. Consequently, the existence of the proffered evidence does not refute the Board's finding that the State had in fact had ample opportunity to respond to the Board's question.

the State's answers was well within the Board's legal authority, we conclude that the Board's decision was not based on an error of law.

Finally, with respect to the State's request that the Board consider its evidence on the administrative activities of its service providers, that the Board reconsider the State's other arguments on appeal, and that the Board reopen the case and allow the State to present additional evidence on its estoppel argument, these requests are clearly untimely. The Board's September 22, 1987 Acknowledgment of Notice of Appeal made it clear to the State that –

> The Board may proceed to decision at the close of the briefing process described in section 16.8, without further opportunity for developing the record. Consequently, the parties' appeal files should be as complete a documentary record as possible. The parties should submit all documents which would assist the Board in making findings of fact on disputed issues, as well as documents which provide necessary background information.

Acknowledgment Letter at p. 2. The Agency's allegation that the donated space at issue was used by the service providers for the direct provision of services was made in the disallowance letter which began the proceeding before the Board. The State had ample opportunity to address this issue, and the others which it now seeks to amplify, by presenting its arguments and evidence in its appeal file, as well as in the reply brief which it chose not to file. The State has not offered any reasons why it should be permitted to supplement the record at this late date, other than an allegation that "it offends commonly

accepted notions of fair play to uphold this disallowance under the circumstances. *Cf. United States v. Lazy FC Ranch*, 481 F.2d 985, 988 (9th Cir. 1973)." Motion at 6. The citation of this case raised no new issues of law, however, but is a reiteration of the estoppel arguments that the Board thoroughly considered, and rejected as unfounded, in Decision No. 870.

Under the circumstances, we find that permitting the State to supplement the record at this time is not justified. The State did not show that the arguments and information that it now seeks to add to the record could not have been submitted on time, nor did it offer any explanations which justify its dilatory behavior throughout this proceeding. We therefore reject the State's Motion for Reconsideration and affirm our decision in Decision No. 870.

/s/ Norval D. Settle
Norval D. (John) Settle

/s/ Alex G. Teitz
Alexander G. Teitz

/s/ Judith A. Ballard
Judith A. Ballard
Presiding Board Member

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Georgia Department of Human Resources DATE: May 21, 1987
Docket No. 86-179
Decision No. 870

DECISION

The Georgia Department of Human Resources (State) appealed a decision by the Commissioner of the Administration on Aging (Agency) disallowing $1,132,818 in federal financial participation (FFP) claimed by the State under Title III of the Older Americans Act, during the period July 1, 1982 through June 30, 1985. Of the total disallowance, $728,361 was for costs of "nutrition administration" charged as Title III-C costs by the Atlanta Regional Commission (ARC), an area agency on aging, and $404,457 was related to in-kind contributions that had been used as the non-federal matching share of ARC administrative costs.

The State argued that the costs were properly charged under applicable cost principles and the Agency should be estopped from taking this disallowance due to alleged instances of affirmative and acquiescent conduct by Agency officials.

Upon review of the parties' submissions, we conclude that the disallowance should be upheld in full. The costs charged to Title III-C as "nutrition administration" should have been charged to area plan administration

because the functions were allocable to that cost objective. The alleged in-kind contributions of space by nutrition providers were not properly allocable to area plan administration and therefore could not be used to match administrative costs. In addition, the State has not shown that estoppel should be applied.

Background

Under the Older Americans Act of 1965, Public Law 89-73, Title III, as amended, 42 U.S.C. 3001 *et seq.* (the Act), the State administers programs authorized and funded by the Act through 18 planning and service areas. The regulations governing administration of these programs are found at 45 CFR 1321 (1981-1984). The State is responsible for review and approval of plans submitted by the area agencies to ensure that they satisfy federal requirements. 42 U.S.C. 3027(a)(2); 45 CFR 1321.45(a)(4). This responsibility includes ensuring that the costs and activities for which it is obligating both federal and state grant funds are allowable under the Title III program and the cost principles promulgated in grants administration regulations, 45 CFR Part 74.

During the relevant period, the Act provided that no more than 8.5 percent of a state's allotment could be used to pay for the cost of area plan administration, and federal funds could not be used to pay for more than 75 percent of the total of such costs. 42 U.S.C. 3024(d)(1)(A), as amended by Pub. L. 97-115. If the required 25 percent non-federal matching share was made up of in-kind, rather than cash, contributions, those contribution [sic]

had to be "allowable." 45 CFR 74.53(e), 1321.201; OMB Circular A-87, C.1 and C.2.

ARC was the area agency responsible for the seven-county Atlanta metropolitan area. During the disallowance period, its area plans, which were reviewed and approved by the State, called for the provision of congregate and home-delivered meal services to the elderly through contracts with other organizations.[1] It is undisputed that ARC did not provide nutrition services directly to beneficiaries.[2]

Early in 1985, during an administrative review of all area agencies in Region IV, the Agency identified apparent

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[1] In addition to congregate and home-delivered meals, the regulations include as nutrition services which may be included in an area plan "outreach and nutrition education," 45 CFR 1321.141(a). The State did not establish that the area plan included these activities as service components.

[2] The Agency alleged that under Georgia law ARC was forbidden to provide services directly to beneficiaries. Disallowance Letter at 5. Moreover, the Act contains a strong preference against direct provision of services by either the State or area agencies on aging. *See* 42 U.S.C. 3027(a)(10) ("Each such [state] plan shall:

> . . . provide that no supportive services or nutrition services, will be directly provided by the State agency or an area agency on aging, except where, in the judgment of the State agency, provision of such services . . . is necessary to assure an adequate supply of such services, or where such services are directly related to such State or area agency on aging's administrative functions, or where such services of comparable quality can be provided more economically by such State or area agency on aging."). *See also* 45 CFR 1321.103.

problems with expenditures of Title III funds in the State. Upon closer examination, the Agency determined that during State fiscal years (FY) 1983 through 1985 (July 1, 1982 through June 30, 1985) the State had permitted ARC to use Title III-C funds, in amounts over and above the 8.5 percent allotment for area administration, to pay for "nutrition administration," even though ARC was not a direct provider of nutrition services. This resulted in a disallowance of $728,361 in FFP. In addition, the Agency found that during FY 1983 and FY 1984, ARC accepted in-kind contributions in the form of donated space from two independent service providers and used those contributions to meet its 25 percent match requirement for area plan administration. The Agency maintained that these contributions could not count toward satisfying the match requirement because the space was apparently used by the nutrition providers themselves, not by ARC. Thus, these in-kind donations were not allowable as costs allocable to area plan administration. The resulting shortfall in non-federal match was reflected in a disallowance of $404,457 in FFP.

In its submissions, the State argued that there was nothing in the statute or applicable regulations that prohibited ARC from charging Title III-C nutrition funds for its nutrition administration activities. The State also contended that the Agency was erroneous in its contention that the in-kind contributions were not allowable. The State asserted that since there is no specific prohibition against using area plan administration funds to pay for third party contractor administrative costs, the use of third party administrative costs (donated space) as an in-

kind match was allowable. In addition, the State maintained that the contributions were allocable to the overall Title III cost objective. Finally, the State contended that the Agency should be estopped from taking this disallowance because it had allegedly approved use of Title III-C funds for nutrition administration, had misled the State into thinking that a prospective policy change would resolve this issue to the Agency's satisfaction, and had never challenged these practices during past reviews.

As noted above, we have concluded that the disallowance should be upheld in its entirety. We discuss each of the State's contentions in turn below.

Analysis

"Nutrition administration" costs are allocable to area plan administration, subject to the 8.5% cap

The State contended that although the Agency maintained that there is no legal basis in the Act or regulations for an area agency which is not a direct service provider using Title III-C funds for administrative services, the Agency did not identify a specific section of either the statute or regulations which prohibited such a practice. Although the State never argued that ARC was a direct service provider, it contended that the distinction drawn by the Agency between ARC and another area agency, which the Agency accepted as a direct service provider, was technical and meaningless. In order to buttress its contention that the administrative costs charged to the nutrition funds were nutrition-related, the State provided with its appeal file a listing of ARC staff functions that

were charged to the funds during the relevant period. See Attachments to Ex. S7.

The Agency argued that ARC was not a service provider, so that the types of costs it had charged to the grant as "nutrition administration" could be allowable only as costs of area administration under 42 U.S.C. 3023(c)(1) and 4024(d)(1), or as program development and coordination costs under 45 CFR 1321.25(h). However, since ARC had already obligated up to its 8.5 percent statutory limit for administrative costs, and since it conceded that many of the claimed costs would not fit the definition of program and coordination costs (appeal brief at 7), neither of those rationales was available for these costs, according to the Agency.

We first note that the State misconstrued the basis for the disallowance. The Agency did not take the position that Title III-C funds may never be used for administrative costs associated with nutrition services for the aging. The Agency's point was that the functions the State called "nutrition administration" had to be charged as part of the cost of area plan administration, subject to the 8.5 percent cap. The State's method of charging in effect classified these functions as "nutrition services."

To resolve the issue of how the State should have charged for the functions that it labelled as "nutrition administration," we must examine the record to determine what those functions were. The Agency characterized ARC's functions as monitoring, evaluation, technical assistance, development and coordination with the area agency's various contractors and service providers. Apart from an unsupported allegation in its appeal brief concerning

ARC's role as bid collector for area nutrition services providers, the State's explanation of what ARC activities constituted "nutrition administration" was in the State's Exhibit S7. This exhibit contained a "Listing of ARC Staff Functions Included in Nutrition Program Administration Costs Charged to Title III, C.1 and C.2 Through June 30, 1985," dated March 5, 1986 (to which we refer as the "1986 document"), and four "1984 Work Program Subelement Summary Descriptions" (summary descriptions) which detailed ARC work activities for the congregate and home-delivered meal services programs. Despite the title "1984 Work Program," which appeared at the top of each of the four summary descriptions, the two documents concerning the congregate meals program were labelled as prepared on September 30, 1982, and the set for the home-delivered program was apparently prepared September 30, 1983.[3]

Although the March 6, 1986 letter to which these documents are attached implies that the summary descriptions are back-up documents for the 1986 document, the differences between the contemporaneously prepared documents and the 1986 document, which was prepared as a part of the State's response to the Agency's audit, is striking. The summary descriptions contain the signature of the division chief as preparer and the department director as approving official; the March 1986 listing does

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[3] Although the documents for each program are labelled as being prepared on the same date and are identical in content, the subelement numbers and page numbers appearing at the bottom of the form are different. These discrepancies were not noted or otherwise explained by the State in the letter to which these documents were attached.

not list any author. The congregate meals summary descriptions list the activities to be performed by ARC and by the providers. The March 1986 document lists only staff functions for ARC, and it reports a much broader range of duties for the area agency, including some that are designated as provider activities by the 1982 congregate meals documents, such as menu planning and training of volunteer workers.

Even if it were to be argued that the earlier documents consist of the agency's *plans* while the later document reports the agency's actual *practices*, the following factors convince us that the earlier documents provide the best evidence of the functions actually provided by ARC during the relevant period:

- The 1982 and 1983 documents were apparently prepared at the same time that the activities were taking place as part of the agency's planning process. The 1986 document was written as a defense to a possible disallowance.

- Although the 1986 document describes some activities, such as menu planning and evaluating food vendors, that seem characteristically those of a direct service provider, the State never disputed the Agency's assertion that ARC was prohibited by State law from providing direct nutrition services.

- It was the summary descriptions to which the Agency referred in the disallowance letter, and the State did not dispute, during Board proceedings, that Agency description of ARC's staff functions.

Based upon the above considerations, we conclude that the September 30, 1982 and September 30, 1983 summary descriptions provide the best evidence of the activities of ARC that were charged to the grant as nutrition administration. This evidence shows that these functions consisted of monitoring the activities of nutrition providers for compliance with the statutory and regulatory requirements, evaluating the home-delivered meals program, and providing technical assistance for both programs as needed.

The State contended that the Agency cannot disallow these costs because there is no specific regulation that classifies these functions as area agency administrative costs. The regulations are by no means as obscure as the State argued, however. Although "area administrative costs" are not specifically defined in the Act or the regulations for aging programs, the disputed functions are clearly area agency administrative costs because they are the duties required of all area agencies by the statute and the regulations. *See* 42 U.S.C. 3026(a); 45 CFR 1321.77(c), 1321.93(d). Moreover, this grant is also governed by the government-wide cost principles of 45 CFR Part 74, which incorporates Office of Management and Budget (OMB) Circular A-87 cost principles. 45 CFR 74.171(a). Those principles require that costs be allocated to the cost objective which they benefit. OMB Circular A-87, Att. A, section C.2.a. The State's description of these functions as benefitting the entire Title III program is meaningless; the issue is whether these activities benefit the cost objective of providing congregate and home-delivered meals to the elderly under the area plan so that they are outside the scope of the 8.5 percent cap on administrative costs.

ARC's functions of monitoring, evaluation, technical assistance, development and coordination with the area agency's various contractors and service providers serve the objective of overall administration rather than that of providing direct nutrition services.

Moreover, funding these types of activities out of funds allocated for providing nutrition services to the elderly frustrates the clear legislative intent to limit expenditures of allotted funds for administrative costs. *See* 47 Fed. Reg. 41756 (1982).

Based on the foregoing, we reject the State's arguments and uphold this part of the disallowance.

The Donated Space Was Not Allocable to Area Administrative Functions and Thus Was Not Allowable as In-Kind Match

With respect to the disputed in-kind match, the State made an argument similar to that rejected in the previous section, namely that since the Agency could not point to a specific provision prohibiting this claim, it must be allowable. In addition, the State reiterated its argument that these costs were all related to the overall Title III objective.[4]

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[4] The State also argued implicitly that if it could use area administration funds to pay a third party contractor's administrative costs, donated space that was used by the contractor for administration could be credited as an in-kind match for area administration. This argument is purely hypothetical, however, since the State neither alleged nor proved that the space was used for administrative purposes. Consequently, we do not discuss it further in this decision.

It is difficult to glean from the record precisely what were the in-kind donations from service providers that the State claimed as non-federal in-kind match in order to satisfy the match requirement for administrative costs. The Agency described it as "[d]onated space used solely by independent contractors for the direct provision of services to beneficiaries" (Response at 7). The State *implied* that it might have been space used by the providers for administrative functions which the State could have delegated to the provider. *See* State's Ex. S7 at p. 2. When asked a direct question by the Board as to where the space was located, who used it, and what functions were performed there, however, the State never answered.[5]

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[5] These questions were posed to the State by telephone on March 25, 1987, and confirmed in writing by letter on March 30, 1987. The answers were to be included in the State's reply brief, which was due on or around April 7, 1987. Not only did the State never respond, but its counsel failed to return telephone calls made to inquire about whether an answer was forthcoming. *See* Memoranda of Telephone Conversations dated April 15, 17, 21, and 29. On May 1, 1987, a woman identifying herself as a secretary for one of the State's counsel called to say that the information would be mailed soon. She was also asked to have counsel telephone the Board, but no one ever called. We find this behavior particularly egregious inasmuch as the Board previously found it necessary in this proceeding to issue an Order to Show Cause to the State for failure to file a timely submission and to return telephone calls inquiring about it. Although the Board could have dismissed this appeal summarily for failure to meet a requirement established by the Board (*see* 45 CFR 16.15(b) we determined that the record before us was complete enough to proceed to decision. *See also* 45 CFR 16.15(c). As indicated in the text, however, we infer from the State's failure to respond to our questions that the information, if provided,

We infer from the State's failure to respond that the Agency's characterization of the donated space is correct. Thus, under the cost principles cited above which require that a cost must be allocated to the cost objective which it benefits, it is clear that space being used by service providers for the direct provision of nutrition services cannot properly be allocated to area administration. Accordingly, this donated space cannot be allowable as in-kind match for area administration.

The Agency Is Not Estopped from Taking this Disallowance

In its submissions, the State argued that the Agency should be estopped from taking this disallowance, and it claimed that it had proved the traditional elements of estoppel:

(1) the party to be estopped must know the facts;

(2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has the right to believe that it is so intended;

(3) the latter must be ignorant of the true facts; and

(4) he must reasonably rely on the former's conduct to his injury.

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would prove to be adverse to the State. *Cf.* Federal Rule of Civil Procedure (FRCP) 16(f) (sanctions for failure to obey a scheduling or pretrial order); FRCP 36 (sanctions for failure to comply with discovery order). In any event, the State's failure to file a reply brief leaves unchallenged the Agency's assertion about the actual use of the space.

United States v. Georgia Pacific, 421 F.2d 92, 96 (9th Cir. 1970).

The State asserted that the Agency should be estopped because of both affirmative and acquiescent conduct. As affirmative conduct giving rise to estoppel in this case, the State asserted that it had raised the question of whether charging administrative costs to Title III-C funds was permissible during a training session and a meeting of State Aging Directors conducted by Agency personnel and had been told in each instance that it was. In addition, the State maintained that the Agency had misled it during this audit by agreeing at a meeting that a prospective policy change in the manner it was charging administrative costs would satisfactorily bring the State into compliance, so that the State failed to make adjustments during FY 1985 that, it implied, could have reduced the amount of the disallowance. Finally, the State contended that the Agency should be held to have acquiesced in the ARC's challenged practices because the Agency never challenged them during past reviews by the Inspector General and the regional office of the Agency. The State cited the following cases in support of its contention that estoppel should lie against the federal government in this case: *Cooke v. United States*, 91 U.S. 389, 398 (1875); *Ritter v. United States*, 28 F.2d 265, 267 (3d Cir. 1928); *United States v. Eaton Shale Co.*, 433 F.Supp. 1256, 1272 (D.Colo. 1977); *Molton, Allen and Williams, Inc. v. Harris*, 613 F.2d 1176 (D.C.Cir. 1980); *Cinciarelli v. Reagan*, 729 F.2d 801 (D.C.Cir. 1984).

As an initial matter, the State seriously misstated the current law of estoppel with respect to the federal government. The Supreme Court laid down the principle that

the federal government can not be estopped by unauthorized statements or representations of its agents in *Federal Crop Insurance v. Merrill,* 332 U.S. 380 (1947). The Court has since declined to adopt a flat rule that estoppel may not in any circumstances run against the government. See *Heckler v. Community Health Services* 467 U.S. 51, 60, 61 (1984). The Court has said, however, that in addition to the traditional requirements for estoppel against a private party, there must at least be something more to estop the government. "It is well settled that the Government may not be estopped on the same terms as any other litigant." *Community Health Services, supra,* at 60.

The cases have indicated that the extra requirement needed to estop the government is "affirmative misconduct" on the part of a government agent. The Court has never come out directly and said that affirmative misconduct will estop the federal government; it has said that estoppel will *not* be applied in the absence of affirmative misconduct. *INS v. Miranda,* 459 U.S. 14, 17 (1982); *Schweiker v. Hansen,* 405 U.S. 785, 788 (1981); *INS v. Hibi,* 414 U.S. 5, 8 (1973). While "affirmative misconduct" has not been explicitly defined by the Court, it is clearly something more than the failure to provide accurate information. In the present proceeding, the State has not only failed to meet this standard, but it also has not established the facts necessary to estop an ordinary party.[6]

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[6] In the cases cited by the State, the Court found that as an essential element of estoppel against the government, the party invoking estoppel must establish that the government agent whose actions are the basis for the estoppel claim must have the

With respect to the advice which the State alleged that it received about charging Title III funds for administrative costs, the State did not provide critical information that would make this allegation credible. The State did not, for example, state when either the training session or the State Aging Directors meeting where this advice was given took place, what Agency officials participated, which Agency official gave the alleged advice, and in what context the alleged advice was given. The context is particularly important because the simple statement that nutrition funds may be charged for area administrative costs is correct – Title III-C funds are among the program funds that may be tapped for the 8.5 percent cap for area administration. 42 U.S.C. 3024(d). This disallowance is based, however, on the State's charging Title III funds for area administration for amounts *beyond* the 8.5 percent already allocated for area administration costs.

The allegation that this specific erroneous advice was given is also seriously undercut by the statements of other Region IV State Aging Directors, reported in Exhibit S2, which almost unanimously hold that their understanding is that such a use of Title III funds would

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authority to bind the government. For example, in *Ritter v. United States*, 28 F.2d 265 (3d Cir. 1928), the court held that estoppel would not be applied because the government agent involved did not have authority to waive the regulatory requirement in question. The District of Columbia Circuit pointed out that where the government agent has the authority to waive a requirement, we are dealing with the principles of waiver and so *Merrill* does not apply. *See Molton*, 613 F.2d at 1178, 1179; *Cinciarelli*, 729 F.2d at 78, 79. The 8.5 percent cap on administrative costs is a statutory requirement which Agency officials did not have authority to waive.

be contrary to the Act. (This also undermines the State's allegation that reliance on such advice, even if given, would be reasonable.) Finally, the alleged advice was oral, which makes reliance upon it even more suspect. *Community Health Services,* 467 U.S. at 66. It is therefore evident that this allegation cannot support a finding of estoppel against the government.

The State also maintained that estoppel should be applied against the Agency because the State was led to believe during a May 15, 1985 meeting with the Agency that the Agency would not seek a disallowance on the nutrition administration costs issue if the State made a prospective change in its policy. The State provided in support of this claim a letter dated May 23, 1985 from the State Director on Aging to the Agency's Regional Director which stated that it summarized the agreements made at the May 15 meeting. State Ex. S27. The State implied that if it had realized that a disallowance for that fiscal year was contemplated, it could have directed the area agencies to reprogram some funds so as to reduce the amount of the disallowance. Appeal Brief at 24.

The letter proffered by the State as evidence of its agreement with the Agency does not explicitly state that prospective policy changes will resolve the dispute. Instead, the letter merely sets forth prospective policy changes the State promised to make with respect to the "nutrition administration" issue and seeks approval from the Agency for advice that the State proposed to provide to area agencies. Subsequent correspondence from the Agency, Exhibits S16 and S25, expressed Agency satisfaction that the challenged practice was being corrected, but

did not explicitly withdraw the Agency's claim for previously misspent funds. Given the significant sum of money both parties believed was involved with this issue at the time – $405,847 for FY 1985 alone, according to Exhibit S16 – it is significant that neither party put the alleged agreement to forgive this large unallowable charge in writing.

Moreover, the State's claim that it might somehow have avoided some of the disallowance had it known that prospective policy changes were not enough is unconvincing. The State does not explain what it would or could have done differently if it had understood on May 15, 1985 that a disallowance was contemplated. While it implied that it might have somehow reprogrammed some current and prior year funds, it does not explain why that option was foreclosed by the time that the disallowance letter was issued. Moreover, we cannot understand how else the State could have charged the funds and still retained FFP, since it had apparently expended up to the 8.5 percent limit in administrative costs already, and it admitted in its brief that the majority of these costs could not be charged to program development under section 1321.25(h). Appeal Brief at 7.

The final circumstance cited by the State as giving rise to an estoppel is the failure of the Agency to identify, during prior reviews and audits, the fiscal practices now challenged in this disallowance proceeding. Specifically, the State noted that during the disallowance period, the Agency's regional staff conducted quarterly on-site reviews of the State's operations, which included visits to area agencies including ARC. In addition, the Office of Inspector General (OIG) of the Department of Health and

Human Services conducted an audit of the State's financial practices for FY 1979/80 and FY 1980/81 and concluded in particular that ARC "had sound financial management . . . and no questioned costs." Appeal brief at 23: State Ex. S35.

First of all, the OIG audit is irrelevant here because it covered a time period prior to the particular change in the regulations governing area administrative costs (the 1981 requirement that area agencies spend 8.5 percent before charging administrative costs to program development) which the State admitted gave rise to a change in the method by which it charged the costs at issue here. Appeal brief at 4, 7-8. Moreover, the Agency cannot be estopped from disallowing costs that were discovered in a comprehensive audit because it had not questioned these practices during its periodic program reviews. Pennsylvania Department of Public Welfare, Decision No. 848, March 13, 1987. As we stated in *Pennsylvania:*

> Program reviews involve examination of program administration, the emphasis of which is on examination of case records and quality control systems monitoring recipient eligibility. (45 CFR 201.10) Audits are reviews of state agency operations conducted to ensure that funds are being "properly expended," (45 CFR 201.12(a)(2)) and to determine "the allowability of costs." (45 CFR 201.12(b)) Oklahoma Department of Human Services, Decision No. 809, November 18, 1986. The Agency's reviews did not preclude the agency from doing an audit and imposing a disallowance.

In other words, the Agency's approval of general program administration cannot be relied upon by the State as

ratification of all its fiscal practices. Consequently, we also reject this basis for assertion of estoppel against the Agency.

Conclusion

Based on the foregoing, the disallowance is upheld in its entirety.

/s/ Norval D. Settle
Norval D. (John) Settle

/s/ Alex G. Teitz
Alexander G. Teitz

/s/ Judith A. Ballard
Judith A. Ballard
Presiding Board Member